Participating as Amicus Curiae in Exclusionary Zoning Litigation: Developing the Court's Understanding of the Principles of Environmental Justice

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B.A. Geography
Ohio University, 1995

SUBMITTED TO THE DEPARTMENT OF URBAN STUDIES AND PLANNING
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER IN CITY PLANNING
AT THE
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

JUNE 1999

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ABSTRACT

This thesis analyzes several aspects of the difficulties in litigating concerns of environmental injustice in order to purpose an alternative approach that still allows groups to enter the public policy forum of the court system while avoiding the confines of acting as a party in litigation. Discovering the shortcomings in environmental laws and regulations to address the substantive issues of environmental justice, and finding the discriminatory intent requirement of the Equal Protection Clause of the Fourteenth Amendment to the Constitution difficult to prove, and encouragement in the use of amicus briefs, this thesis describes the potential advantages to participating as amici by environmental justice activists.

An analysis of four exclusionary zoning cases and accompanying amicus curiae briefs was considered to illustrate the information that these briefs can contain that differs from the views presented by the formal litigants in these cases. The use of these briefs was found to offer a mechanism to express broad societal issues, various perspectives, and technical information to assist the court in understanding diverse public interests.

This study concludes that amicus briefs may by particularly useful in the environmental justice movement because the issues of environmental injustice are often difficult to translate into legal challenges. The writing of amicus briefs by community members can maintain a local commentary, capturing the voices and stories of a community that reflect a specific perspective that is not easily understood by outsiders. Through these briefs, environmental justice activists can explain issues that may either be touched upon or not included in the party briefs, describe the impact of a ruling on an effort to realize the goals of environmental justice, and potentially influence the court's holding in a case. Therefore, the use of amicus briefs by environmental justice activists, coupled with community organizing strategies, may be better suited for educating the judiciary about these concerns, than a narrow legal claim.

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Chapter One: Introducing the Idea

> My basic sense of it has always been to get people to understand that in the long run they themselves are the only protection they have...people have to be made to understand that they cannot look for salvation anywhere but in themselves.
>
> - Ella Baker, talking about the civil rights movement

Several years ago I was introduced to an unfamiliar aspect of urban life through my job as a cartographer. My assignment at the time involved data gathering and mapping of fifteen categories of government-reported toxic sites in the New York metropolitan area. I traveled to one neighborhood in Brooklyn, New York, and looking out the window from my seat on the elevated train, I saw industrial and hazardous land uses serving as surrogates for backyards and parks. Stepping on to the platform I was truly amazed at the dichotomy of beautiful homes next to vacant lots, boarded up facades, garbage dumps, and parcels filled with construction debris surrounded by sagging chain link fences.

We traveled via Greyhound from Ithaca to this neighborhood to discuss their urban environmental problems in light of a new bond act passed in New York State that could be used to redevelop the vacant industrial sites that abutted the old brownstones. The group was hesitant to put too much faith or resources into developing a plan for state funding. Their hesitation came from a history of unsuccessful efforts to bring attention to the community's concerns of living next to so many hazardous facilities. The mood changed when I started to walk through the findings of our environmental report that mapped and classified the "known" and "potential" hazards sited in their area.

The maps and the data showed that their neighborhood was surrounded by both classes of hazardous facilities, something that was not news to them. But what it also showed was the prior industrial uses of the now vacant lots that had never been cleaned up, the past uses of land that were not remediated before (re)development, and the large number of ancient underground storage tanks for oil that had never been pulled. All of this information came from data required under federal and state laws for permitting, monitoring and compliance measures. Data provided for the underground storage tanks was required because older tanks were seen as an environmental risk due to the likelihood that the tanks were now leaking.

There was genuine sentiment that this neighborhood, like many others they had lived in or seen throughout the city, was passed over. It was unclear why environmental laws, written to promote the public health and welfare, didn't work in this area, with a concentration of so many different potentially hazardous land uses. Was this a result of local zoning ordinances that had initially mapped the area as residential, and had since been amended to provide for a "mixed-use" zone, enabling industry to locate next to residences?

What really matters here are the remarks of the community members on more fundamental issues of justice, fairness, and equality that somehow did not apply to their neighborhood. In this case people did not want to vote with their feet. They wanted a neighborhood that was cleaner and safer; they wanted the vacant lots turned into something useful instead of illegal garbage dumps; they wanted a voice in land use decisions that impacted their daily lives; and they wanted to know about environmental hazards from their representatives, not from groups hired to tell them the story. All told, the community organizers in Gowanus Canal wanted what other similar groups throughout the country were calling for, environmental justice.

The Study

Local land use controls written into zoning ordinances are sometimes a remedy for some of the problems existing in urban areas that environmental laws are not designed to address. Conversely, these land use controls can actually exacerbate feelings of injustice and inequity in several different ways. First, zoning ordinances can divide urban areas in such a way that unequally burdens some residents by incompatible, but contiguous uses. Second, once these zones are established for industrial and/or hazardous uses, new facilities are more likely to be sited in these areas without significant permitting hassles because they now fit into the existing land use patterns of the area. Finally, specific land use controls that deprive mostly poor, minority communities of essential equal protection from harmful land uses, or are written in a way that hinders the integration of peoples into these areas based on economic class and race, are exclusionary, and environmental injustices.

This study begins by examining the latter example. The relationship between environmental justice issues and exclusionary zoning is based on my working definition, which is:

> Issues arising from discriminatory decisions in land use policy in the form of zoning ordinances that separate people, places, and work in an exclusionary manner and that adversely affect the quality of life of urban residents.

This relationship is developed in order to understand the similar roots of these issues, and the subsequent difficulties, based on the underlying factors that shape these issues, that community groups face when they attempt to challenge perceived discriminatory policies as legal issues. There are many reasons why environmental justice and exclusionary zoning claims have been difficult to redress in the court system, but the fundamental concerns of justice and fairness expressed as part of the environmental justice movement requires further attempts at gaining acceptance in the courts.

The third chapter of this thesis explains an approach to litigation that may expand a pertinent case beyond the claims of the litigants to include issues of environmental justice.

This approach is the amicus curiae brief, a legal tool that offers a flexible format for expressing environmental justice interests in a case without the confines of legalese or the restrictions of pursuing a narrow legal claim. To better understand the potential benefits to environmental justice activists of participating as amici in pertinent litigation, the fourth chapter examines four exclusionary zoning cases and their respective amicus briefs. Some of the exportable lessons learned from these examples are applied in an outline of the information that could be included in a brief to support the plaintiffs in the environmental justice case analyzed in the last chapter.

The evidence in this study is provided in an attempt to support several claims that will be developed throughout the paper. First, the restrictions of making a specific legal claim under existing laws in order to gain standing in court, and the "absence of clear and challenging legal issues" (Babcock 1996, 106) in environmental justice concerns are impediments to redressing these issues in the court system. More specifically, the discriminatory intent requirement of the Equal Protection Clause of the Fourteenth Amendment makes pursuing claims of environmental injustice under this law difficult. Proving that policies or actions, or their results, intentional discriminated against an individual or group based on their economic class or race is a high barrier to cross. Therefore, participating as amici, coupled with community organizing strategies, supports a different kind of entrance into the policy-making world of the court system. These briefs can explain the broad societal issues that may either be touched upon or not included in the party's briefs, which can educate the court about environmental justice concerns, and potentially influence the court's holding, without the restrictions mentioned above.

Second, amicus briefs may be particularly useful in the environmental justice movement because the issues are so deeply embedded in a history of segregation and unequal opportunity that it is often difficult to translate these concerns into legal challenges that maintain the real roots of grassroots struggles. The writing of amicus briefs by community groups can maintain a local commentary, capturing the voices and stories of a community that reflect a specific perspective that is not easily understood by outsiders. Because these outsiders are often the people in decision-making roles that can influence policy reform, their understanding of environmental justice issues is essential to creating more equitable outcomes that "society as a whole will follow and respect." (Epstein and Knight 1999, 232)

Third, because the origins of environmental justice are not legal issues, but rather economic and political matters, many environmental justice activists consider litigation an inappropriate means of addressing these concerns. This thesis does not contest this argument, but rather suggests the use of amicus briefs as an alternative to litigation in some cases based on the idea that pursuing a struggle in court is sometimes required as a last resort. These briefs, if well crafted, offer community groups with limited resources and complex concerns an opportunity to affect a decision without the

risks of an unsuccessful outcome or the costs of litigating. Therefore, the use of amicus briefs by environmental justice activists may be better suited for educating the judiciary about environmental justice, than a narrow legal claim.

Chapter Two: Impediments to Justice: The Difficulties in Litigating Claims of Environmental Injustice

While few people would dispute that the inequities of society seem to be especially evident in urban areas, and scholars suggest that "Americans overwhelming deplore both racial discrimination and environmental degradation (Foreman p.1)," the convergence of cultural, racial, economic and environmental issues as mutually reinforcing is a contemporary one. The concept of social justice and the claim that the current environmental protection/regulatory framework works to divide society on economic class, race, and power lines has emerged as a "prominent part of the national dialogue over citizen empowerment and the environment" (Capek p. 5) in the name of environmental justice.

The Concept of Environmental Justice

Grassroot organizations consisting mainly of low-income, people of color, are challenging perceived inequities and discrimination resulting from environmental laws and land use patterns as environmental racism.[1] The concepts of environmental justice[2] and environmental equity[3] are in part based on the national response by local community groups to remedy the situations that have led to environmental racism. "Environmental justice is premised on the notion that the rights of toxic contamination victims have been systematically usurped by more powerful social actors and that 'justice' resides in the return of these rights (Capek p. 8)." Environmental justice activists...[see] "environmental problems as only part of the larger social issues of racism and cultural and economic injustice (Gauna p. 1,9)."

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[1] Bunyan Bryant defines environmental racism as "an extension of racism. It refers to those institutional rules, regulations, and policies of government or corporate decisions, that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based on certain prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of color from environmental decisions affecting their communities.

[2] Environmental justice-EJ is broader in scope than environmental equity. It refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and productive. Environmental justice is served when people can realize their highest potential, without experiencing the "isms". Environmental justice is supported by decent paying and safe jobs; quality school and recreation; decent housing and adequate health care; democratic decision-making and personal empowerment; and communities free of violence, drugs, and poverty. These are communities where both cultural and biological diversity are respected and highly revered and where distributed justice prevails.

[3] Environmental equity- refers to the equal protection of environmental laws. For example, under the Superfund clean-up program it has been shown that abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority action list that those in white areas. Therefore laws should be enforced equally to ensure the proper siting, clean up of hazardous wastes, and effective regulation of industrial pollution, regardless of the racial and economic composition of the community.

As William Shutkin[4] points out, "environmental justice entails much more than a clarion call to action on the part of low-income and minority communities facing environmental and public health hazards. It is ultimately about the promise of American democracy and the possibility of redeeming the environment as a preeminent symbol of our democracy's highest aspirations (Shutkin p.580)." Drawing on his own beliefs and the writings of others, Shutkin later adds, "conversely, the persistence of environmental injustice-the exclusion and unequal treatment of low-income and minority communities in matters concerning the distribution of environmental benefits and burdens-fundamentally undermines our democratic faith and commitments (Shutkin p.580)."

In order to better understand environmental justice as both a set of guiding principles to challenge questions of environmental racism and environmental equity and as a social justice movement to pursue answers to these questions, the concept of the specific "frame" within which community groups have mobilized requires some description.

Section 1: Environmental Justice and Environmental Law

The Framework of the Environmental Justice Movement

The concept of an "environmental justice" frame is important in understanding and interpreting the potential impediments community groups face in mobilizing for social change. Because the goal of this paper is to purpose a rationale for the use of amicus curiae briefs in environmental justice litigation, and not to discuss the theories of resource mobilization and social construction, the ideas of this section are drawn largely from the academic literature on environmental justice, most notably the work of Stella Capek[5].

Capek's arguments are grounded in the sociological literature, which contains the writings of many environmental justice academics/activists, to develop the range of barriers that grassroots organizations face in their struggle for self-determination. The numerous studies[6] supporting the concept that race, and therefore often economic class, play a role in the process of siting hazardous

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[4] Past co-director, Alternatives for Community and Environment, Roxbury, MA.

[5] Department of Sociology, Hendrix College

[6] United States General Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (GAO/RCED-83-168),June 1, 1983:United Church of Christ, Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*(New York: United Church of Christ, 1987); Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Boulder, Colorado: Westview Press, 1990); Lavelle, M. and M.Coyle, "Unequal Protection: The Racial Divide in Environmental Law." *The National Law Journal* 15(3) Sept. 21. 1992. United Church of Christ, Commission for Racial Justice, Center for Policy Alternatives and the National Association for the Advancement of Colored People (NAACP) *Toxic Wastes and Race Revisited*, (1994).

facilities, are understood as part of the development of an "environmental justice" frame. Capek writes:

> Defining a situation as unjust is more than an act of categorization; it implies a strategy for action. Residents in contaminated communities are generally pushed by their experiences toward a particular set of mobilizing strategies. A typical (although not inevitable) path is to opt for direct action tactics upheld by an "environmental justice" frame. This choice implies rejection of other possible frames. For example, it has been amply documented that many activists begin with assumptions of fairness about the political and regulatory process in the United States, as well as a naïve faith in science as unbiased and "above politics (Gibbs 1982; Levine 1982). As a result of their experiences, this frame's validity is shattered (p.8)

The concept of an "environmental justice" frame in the context of Capek's study of an African-American community in Texarkana, Texas, consists of four claims that are supported by the literature on environmental justice. Capek begins by stating that the environmental justice frame is built around a concept of rights constructed in part by the actions and rhetoric of previous social movements. Most notable among these the civil rights movement (Capek p.8).

The five claims that create the environmental justice frame relate to environmental issues, but also suggest the general claims of this movement on other issues. These claims include the right to: (1) accurate information about the situation; (2) a prompt, respectful, and unbiased hearing when contamination claims are made; (3) democratic participation in deciding the future of the contaminated community; and (4) compensation from parties who have inflicted injuries on the victim (Capek, p.9). Capek maintains, using case study evidence, that the residents' ability to mobilize for social change was intimately linked to their adoption of an "environmental justice" frame (Capek, p.5).

This evidence is mirrored in the early struggles for environmental justice that took place in Houston, Texas in 1967; Love Canal, NY in 1978; and Warren County, North Carolina in 1982, where citizens recognized environmental problems as injustice, sought answers to these problems, and in the later examples, organized around the concerns in direct action stances. (See Appendix B for a chronology of grassroots efforts and governmental responses and studies in terms of environmental justice).

The local claims of environmental justice took shape as a social movement when communities began to share their stories through grassroots networks that eventually led to a national meeting in Washington, D.C., that helped define the principles of environmental justice and determine a plan of action for this movement.

The Principles of Environmental Justice

Perhaps the most important or symbolic piece of the environmental justice chronology occurred in October 1991, in Washington, D.C. Activists from across the United States came together for the First National People of Color Environmental Leadership Summit. The term "environmental justice" was used for the first time as a means to express the broad beliefs and concerns expressed by the diverse participants. The development of the creed of the environmental justice movement is illustrated in the preamble to the "Principles of Environmental Justice", the document completed by participants at the Summit. The melding of individual stories with social, cultural, and environmental issues created the basic guidelines and "structure" for grassroots organizations to translate into local level activism. The preamble reads as follows:

> We the people of color, gathered together at this multi-national People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities; do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages, and beliefs about the natural world and our role in healing ourselves; to insure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic, and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt the Principles of Environmental Justice.[7]

The "seventeen 'Principles of Environmental Justice' affirmed everyone's right to safe and healthy working environments, quality health care, and freedom from the need to chose between unsafe jobs and unemployment" (Foreman, p. 12). (The full text of the principles can be found in Appendix A). The perceived inequities in environmental protection laws and regulations that prompted civil rights activist Benjamin Chavis to coin the phrase "environmental racism," remain at the forefront of urban grassroots struggles to reclaim their neighborhoods.

A pervasive claim of the environmental justice movement has been the incapacity of environmental laws to protect all citizens equally. In this analysis to determine the difficulties and impediments in litigating environmental justice claims, we can look to the language and ideas behind environmental laws as the first of several barriers to redressing these claims.

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[7] *Proceedings: The First National People of Color Environmental Leadership Summit* (October 24-27, 1991)

Agenda setting, Movements, and Environmental Laws

> The environmental justice literature suggests that environmental and land use laws have provided more environmental benefits to the white and the affluent while providing fewer benefits to or worsening the conditions of the poor and communities of color. In that sense, environmental laws are seen as a "cause" of environmental injustice. The skewing of benefits and burdens occurs in the variety of ways, ranging from the policy-making process to the differing abilities of different groups to take advantage of the protections environmental laws intend to offer.
>
> - Alice Kaswan 1997

Some environmental justice activists, most notably Robert Bullard, maintain that current environmental policies that "exist to manage, regulate, and distribute risks," and provide equal protection through environmental statutes, have failed. He writes, "the dominant environmental protection paradigm reinforces, rather than challenges, the stratification of *people* (race, ethnicity, status, power, etc.), *place* (central cities, suburbs, rural areas, etc.), and *work* (Bullard 1994, p.16).

In his view, the dominant environmental protection paradigm: (1) institutionalizes unequal enforcement; (2) trades human health for profit; (3) places the burden of proof on the "victims," not on polluting industry; (4) legitimates human exposure to harmful chemicals, pesticides, and hazardous substances; (5) promotes "risky" technologies such as incinerators; (6) exploits the vulnerability of economically and politically disenfranchised communities; (7) delays cleanup actions; and (8) fails to develop pollution prevention as the overarching and dominant strategy (Bullard 1994, 16).

The ideas expressed by Bullard can be linked to two different facts. First is the notion that extensive studies on the facility siting process (footnoted in the "environmental justice" frame section), and the role of this process in exacerbating issues of fairness and justice in inner-cities, reflects an "underlying political reality: it is often politically "easier" for government authorities to put toxic dumps in poorer communities (Tsao, p.367)." And second the fact that most national environmental organizations in the 1960s and early 1970s focused on preservation issues surrounding species (some endangered) and their habitats, and the National Park System. These agendas did not talk about the distribution of environmental "problems" such as pollution from hazardous facilities. This is important to consider because the agenda of these organizations played a large role in shaping congressional opinion at the time, which is reflected in the majority of the federal environmental statutes written during this period.

"In the 1970s almost all existing federal laws were promulgated. A key feature of these laws was that they focused primarily on reducing aggregate pollution levels, rather than on the distribution (Kaswan p.260)." Adding to this idea, Professor Gauna writes, "major environmental

laws lack legislative provisions specifically addressing distributional inequity to low income and minority communities, which suggest that the problem was not anticipated, or that there was insufficient political pressure brought to bear upon the issue (Gauna p.3)." The lack of political pressure to consider the convergence of environmental and socioeconomic issues, and the fact that this convergence was not anticipated, goes back to the idea that the environmental movement and civil rights movement had very different agendas at the time. Because the civil rights movement did not focus significant attention on urban environmental issues, which could have developed some political pressure, these issues have only recently received attention from government agencies. Christopher Foreman captures the importance of these ideas in the current struggles for environmental justice. He writes:

> The bedrock federal statutes of modern environmentalism were enacted between 1969 and 1980; environmental justice activists held their first meetings with EPA administrator William Reilly only in 1990-a full decade after Congress passed the last of these laws. By the time of those meetings the EPA itself was nearly twenty years old and well institutionalized. Basic structures and procedures were already in place. Part-but only part-of the frustration of environmental justice advocates is attributable to this late start (Foreman p. 7).

This discourse system, the agenda of national environmental organizations, and the general absence of people of color in these organizations promoted the sentiment, especially among people of color, that environmentalism was a middle-class, white movement. (See e.g., Bullard 1994; Gottlieb 1993; Reich 1992) Some environmental justice activists have therefore argued that the agenda and hiring policies administered by the environmental movement were racist (Boyle 1993; Bryant 1989).

Based on the reality that environmentalism (in terms of these national organizations) did not acknowledge urban issues, and that environmental concerns for low-income, people of color communities were largely situated in their urban surroundings, most activists and/or scholars contend that the ideological gaps which appeared to divide environmental issues on racial lines, was more a result of rhetoric that was not totally opposite, but was totally different. (Boyle 1993; Commoner 1971; Mohai 1985, 1990; Poirier, 1994; Taylor 1989; Torres 1992). Adding to this idea, Hope Babcock writes,

> Federal pollution control laws are national in scope and thus do not address the highly localized problems found in inner cities and their economically disadvantaged communities. Environmental laws typically set broad-based, uniform standards that do not account for cumulative impacts or the synergistic behavior of pollutants in the urban environment. Hence, the urban paradigm—chronic, low level, environmental degradation from numerous sources, including polluted runoff from city streets, air pollution from crowded city streets or freeways, lead poisoning from poor housing stock or old plumbing, and leaking underground fuel storage tanks—is not adequately addressed by federal environmental

laws (Babcock p.15, 16).

While environmental justice advocates may challenge the process of permitting hazardous facilities under existing federal and state statutes and file citizen suit provisions to redress the situations that have caused "environmental racism," the question of justice often still remains. Attorney James H. Colopy writes, "in the environmental justice context, litigants have attempted to use the Equal Protection Clause of the Fourteenth Amendment to challenge the siting of a facility in a community of color on the grounds that the government decision-maker was racially discriminatory in selecting the site. To date, however, none of these claims have succeeded (Colopy p. 145)."

The Link Between Environmental Justice and Zoning

Community groups litigating environmental justice concerns have also pursued claims under Civil Rights[8] and Constitutional Law, in an attempt to redress the real questions of justice as a civil right. The use of the Fourteenth Amendment in environmental justice litigation provides the link between the claims of distributional injustice related to environmental pollutants, and the societal issues of environmental justice developed in exclusionary zoning cases.

"Like exclusionary zoning, the inequitable distribution of toxic waste dumps is patently unfair. In both cases, a community's attempt to bar what they perceive to be an undesirable land use through zoning restrictions imposes large costs on the poor and racial minorities. The analogy between the unfairness inherent in excluding low- and moderate-income housing from certain areas based on zoning and the inequitable distribution of toxic waste dumps is important in states where siting statutes do not completely preempt municipal and regional zoning laws (Tsao p. 403)."

"So far, almost every environmental justice civil rights case brought has alleged only a violation of the equal protection clause of the Constitution. And so far, no plaintiff has prevailed in such a claim in an environmental justice suit, although this strategy has been tried in numerous jurisdictions around the country[9] (Cole 1994, 538)." On this point, Adam Schwartz[10] writes, "in

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[8] Civil Rights Laws, particularly Title VI (42 U.S.C. § 2000d 1988) and Title VIII (42 U.S.C. §§ 3601-3619, 3631 1988) of the Civil Rights Act of 1964. Title VI prohibits discrimination on the grounds of race, color, and national origin by "any program or activity receiving Federal financial assistance." Title VIII bars the refusal "to sell or rent...or otherwise make unavailable, or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin, and bars discrimination against any person in the...sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin."

[9] Harrisburg Coalition Against Ruining the Env't v. Volpe., 330 F. Supp. 918 (M.D. Pa. 1971); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), aff'd without opinion, 782 F.2d. 1038 (5th Cir. 1986); NAACP v. Gorsuch, No. 82-768-CIV-5, slip op. (E.D.N.C. Aug. 10, 1982); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibbs County Planning & Zoning Comm'n, 706 F. Supp. 880 (M.D. Ga. 1989) aff'd, 896 F. 2d 1264 (11th Cir. 1989);Bordeaux Action Comm'n v. Metro. Nashville, No. 390-0214 (M.D. Tenn. Filed March 12, 1990) El Pueblo Para el Aire y Agua Limpio v. Chemical Waste Management, Inc., No. CIV-F-91-578-OWW (E.D. Cal. Filed July 7, 1991) R.I.S.E, Inc. v. Kay, 768 F. Supp. 1144, 22 ELR 20200 (E.D. Va. 1991) aff'd, 977 F 2d. 573 (4th Cir. 1992).

several lawsuits challenging hazardous waste facility sitings that disproportionately affect minority populations, federal courts have ruled against the plaintiffs because they failed to prove discriminatory intent (Schwartz p. 2)." This standard was established in one of the exclusionary zoning case discussed in chapters two and three. In *Village of Arlington Heights v. Metropolitan Dev. Housing Corp.*[11], the U.S. Supreme Court declared that a race-neutral law with a disparate impact can violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution only if there is proof of discriminatory intent. The Arlington Heights doctrine has single-handedly blocked at least five federal cases alleging environmental racism (see footnote #16) (Schwartz p.17).

Section II: Zoning: Land Use Restrictions and Barriers

Zoning and Environmental Justice

The desire to look at environmental justice challenges through the lens of exclusionary zoning evolved from the idea that the environmental justice movement is relatively new and broad in scope. Because the idea behind this chapter is to understand why environmental justice challenges under existing laws have failed in the courts, and how these concerns can still be communicated before the court, it was necessary to focus on one aspect of environmental justice with a legal history. Zoning and land use controls seemed an appropriate route. In accordance with this idea, law professor Dennis Binder begins his index of environmental justice cases, writing;

> If environmental justice is viewed just in terms of locally undesirable land uses (LULUs) being thrust upon a politically impotent neighborhood, the resulting literature may seem disproportionate to the case law. Yet, the reality it that environmental discrimination is a problem of great social significance, well-deserving of extensive discussion. We need to recognize that the placing of LULUs in poor neighborhoods is but part of the post-World War II move to the suburbs, which partially reflects an effort to isolate affluent areas from the hard or undesirable realities of life (Binder p. 163).

As most people who write about land use and zoning in some capacity begin, the concept of zoning was always meant to prohibit or exclude certain land uses from mixing with other uses to promote the health, safety and general welfare of an area. A zoning ordinance can be viewed as discriminatory, or exclusionary, if it results in restricting land uses in a way that results in selecting what "kinds" of people can live in a certain place. A zoning ordinance can also be discriminatory if incompatible uses unequally burden the people living in one section of that place.

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[10] At the time his article was published, 1995, Adam Schwartz was serving as a judicial clerk to the Honorable Betty Fletcher, U.S. Court of Appeals for the Ninth Circuit.
[11] 429 U.S .252 (1977)

As Richard Babcock notes, "it is frequently charged and often apparent, that local zoning practices on the fringes of metropolitan areas are designed to keep out the distasteful aspects of urbanization while permitting access to its fruits. These practices create exclusionary conditions directly in conflict with the goals of social mobility and economic opportunity (Babcock 1996, 107)."

In considering the idea of exclusionary zoning and environmental racism, Professor Jon Dubin argues, "the persistence of stark patterns of residential segregation in the 1990s serves as a reminder of this country's legacy of systematic discrimination in land use policy. At the same time, new and insidious forms of land use assaults-ranging from the disparate impact of toxic waste facilities to the stimulation of foreseeable race-based gentrification-pose unprecedented risks to the survival and integrity of low-income communities of color (Dubin p.801)."

Exclusionary zoning is an aspect of environmental justice that dates back to the first challenge to the police power of an area to restrict how people could live and work, in the case of *Yick Wo. v. Hopkins,* 118 U.S. 356 (1886), sometimes considered the original environmental racism case. From 1886 to the present there have been countless challenges in the federal and state courts regarding land uses deemed incompatible, nuisances or public health concerns, and the resulting effects on individuals and groups.

Zoning as a Constitutional Extension of Local Police Power

> I submit that the statutory purposes of zoning are perverted from their intended application when used to justify Chinese walls of exclusion on the borders of roomy or developing municipalities for the actual purpose of keeping out all but the "right kind" of people or those who will live in a certain kind and cost of dwelling. What restrictions like minimum house size requirements, overly large lot area regulations, and complete limitations of dwellings to single family units really do is bring about community-wide economic segregation.[12]
>
> -J. Hall, dissenting opinion, *Vickers v. Township Committee of Gloucester Township*[13]

Over seventy years ago, in the case of *Village of Euclid v. Ambler Realty Co.*[14], the Supreme Court ruled that a zoning ordinance was an appropriate use of the municipality's police power, and that the ordinance was constitutional in that the end use was to protect health, safety, and the general welfare of the Village. The plaintiff, a landowner, claimed that the ordinance, which was part

[12] 181 A. 2d. 147 (1962)
[13] 181 A 2d. 129, 140 (1962), certiorari denied, 771 U.S. 233 (1963).
[14] 272 U.S. 365 (1926)

of a comprehensive plan to divide the municipality into six classes of use districts, separating industrial, commercial and residential, resulted in a "taking" of their property, as the plaintiff's land was devalued by the "industrial" development restriction on his parcel. The plaintiff claimed the due process clause of the Fourteenth Amendment, which required "just compensation" to be paid for the loss. The Court held that the municipality's ability to designate certain uses was valid, and did not violate due process unless the plan had "no foundation in reason and [was] a mere arbitrary and irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or public welfare.[15]"

Charles Dale concludes from this ruling, "local zoning authority could be constrained only by the limits of the Federal and State constitution or considerations of "general public interest." For the most part, the Court over the next 40 years deferred to the judgment of local authorities by dismissing appeals or denying petitions for certiorari (Dale p.CRS-2)." Beginning in the late 1960s, the focus of land use litigation has shifted as a consequence of cases challenging exclusionary zoning. Recognizing that most zoning regulations could pass the *Euclid* due process test, the court in *Arlington Heights*, and other cases of this nature, have sought to subject exclusionary zoning actions which operate to limit housing opportunities for low and moderate income groups, to more exacting standards of review under the Equal Protection Clause (Dale p.CRS-3,5).

The Concept of Exclusionary Zoning

Legal commentators have defined exclusionary zoning as land use regulation which raises the price of residential access to a particular area and thereby denies that access to members of low-income groups (Sager p.11). Norman Williams defined six exclusionary devices that are typically embedded in zoning ordinances. They are exclusion of multiple family dwellings, restrictions on the number of bedrooms in multiple family dwellings, exclusion of mobile homes, minimum building size requirements, minimum lot size requirements, and minimum lot width requirements (Williams 1975). The concept and impact of exclusionary zoning is well defined in the rhetorical question posed by urban planner and professor Yale Rabin:

> Why is it that older black neighborhoods in many American cities are frequently interspersed with land-uses...which are intrusive, disruptive, even hazardous, and which degrade the residential environment? Is it because blacks are forced into these already hostile surroundings by the pressures of segregation? Or have these incompatible activities somehow intruded into established black residential neighborhoods isolated by segregation?

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[15] 272 U.S. 395

> There may well be some examples of blacks moving next to junkyards; but my own experience suggests that the junkyard moving into the black neighborhood is the more common pattern, and that zoning has played a prominent role in the process.[16]

Professor Jon Dubin draws out the link between environmental justice and zoning, pointing out, "Local governments' exclusionary zoning laws remain a significant ongoing land use planning impediment to African-American residential mobility. These zoning enactments create financial barriers to residential access virtually as effective in operation as the explicitly racial laws invalidated in Buchanan. Exclusionary zoning and planning techniques have been described as both "innumerable and interchangeable" and include a plethora of devices that increase the cost of housing, impede the development of low-cost or subsidized housing, or preclude or discourage residential housing altogether (Dubin p.755)."

The literature on the use of zoning as an exclusionary device to keep out low-income and minority groups is vast.[17] These studies provide information on the movement in the early 1900s to legalize residential segregation through the use of zoning, and the persistent problem of isolation and congestion in inner-cities that is a result of land use controls in the suburbs. Perhaps the most important aspect of the literature on exclusionary zoning is the development of the idea of the role of the courts, especially the U.S. Supreme court, in interpreting cases of discrimination brought against municipalities.

The precedents set in these cases have directly influenced the ability of environmental justice advocates to successfully challenge perceived inequities today. In examining the legal history of exclusionary zoning and judicial decisions at the state and federal court levels,[18]Marsha Ritzdorf provides several conclusions concerning the legal barriers to litigating challenges of unequal protection. Ritzdorf writes:

> The Supreme Court's decisions are the only ones that automatically must be considered in every state. "A state high court opinion, no matter how well reasoned and persuasive, is binding only in the state in which it is delivered. U.S. Supreme Court opinions are literally the law of the land and consequently preclude the possibility of other approaches."[19] In plain language, this means that as we approach the twenty-first century, African-Americans'

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[16] Taken from Dubin 1993, p. 742. Yale Rabin, The Junkyard Nextdoor: Expulsive Zoning in Black Neighborhoods 2 (Sept. 1, 1988) (unpublished manuscript, on file with author).

[17] See e.g., (Babcock and Bosselman 1973; Bergman 1974; Bullard 1994; Dubin 1993; Haar 1996; Mandelker 1995; Payne 1988; Rabin 1989; Sager 1969; Thomas and Ritzdorf 1997; Williams 1955).

[18] *Buchanan v. Warley*, *Washington v. Davis*, *Village of Belle Terre v. Borass*, *Warth v. Seldin*, *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, and finally *Southern Burlington N.A.A.C.P. v. Township of Mount Laurel*

[19] Haar and Kayden, *Landmark Justice*, 16.

> ability to challenge exclusionary zoning as a violation of their constitutional rights is virtually nonexistent. Only if they make a case under the existing fair housing statutes will their voices be heard (Thomas and Ritzdorf p.54).

Ritzdorf draws on the work of Daniel Mandelker to conclude, "The Supreme Court has substantially limited attacks on exclusionary zoning based on claims of racial discrimination under the equal protection clause. Wholesale attacks on exclusionary zoning brought by non-residents are foreclosed in *Warth. Arlington Heights* indicates that the Court will uphold site-specific racial discrimination claims only in blatantly racial cases. A municipality can apparently zone its entire area for single-family development and defend a refusal to rezone for multifamily development as consistent with its 'zoning factors'[20] (Thomas and Ritzdorf p.54)."

Exclusionary Zoning in the Courts

> Even if prejudice were regarded as every individual's own business, discrimination, i.e.- prejudice translated into action- has such devastating effects upon large segments of the population that it is clearly everybody's business (Williams 1955, 349).

Prior to the mid-1960s, however, exclusionary zoning litigation had focused mainly on attacking economic exclusion, most often avoiding the issue of racial discrimination specifically.[21] "The issue of environmental discrimination was just as present four decades ago as today, but because of different perspectives of society, little litigation ensued. Thus, in the 1950s urban renewal would be imposed on minority communities, and freeways would be sited in parks and ghettoes,[22] with relatively few cases filed. In the 1960s and 1970s, many of the issues discussed in the environmental justice context today were raised in the exclusionary/large-lot zoning litigation[23] as well as in the denial of municipal services cases[24] (Binder p.164)."

After 1965, zoning ordinances were more frequently challenged in the state courts on the issue of race. "In the 1970's, developers and affordable housing advocates began challenging exclusionary zoning practices in the courts, and by 1975, their challenges appeared to have met with

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[20] Daniel Mandelker, *Land Use Law*, 3rd ed. (Charlottesville, VA: Michie Company, 1993), 322-23/

[21] There were several exceptions to the rule. In *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16 (1917) and *Philbrook v. Chapel Housing Authority Hill*, 269 N.C. 598, 153 S.E.2d. 153 (1967), plaintiffs challenged zoning ordinances which blatantly discriminated against "people of color" by not allowing them to occupy housing within the city.

[22] *See, e.g.,* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[23] *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1976); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) ("Mount Laurel I"); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("Mount Laurel II"); *Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) ("Mount Laurel III"); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980); *Briseno v. City of Santa Ana*, 6 Cal. App. 4th 1378 (1992).

remarkable success. In its landmark opinion in *Southern Burlington County NAACP v. Township of Mount Laurel*,[25] the New Jersey Supreme Court held that exclusionary zoning violated equal protection and substantive due process guarantees in the state constitution, and ruled that New Jersey municipalities had to meet their "fair share" of the "regional need" for low and moderate-income housing (Weinstein 1993, 105)." Exclusionary zoning cases heard by the U.S. Supreme Court, however, were less successful for plaintiffs challenging housing opportunities on equal protection grounds.

Several cases heard during the 1970s developed the standard of review for challenges to the constitutionality of various zoning ordinances on equal protection grounds. *Dandridge v. Williams*[26] supported the concept that if the court found a "rational relationship" between the language of an ordinance and the furthering of a legitimate government objective, an equal protection challenge was invalid. In this case, the court ruled that "an ordinance does not deny equal protection simply because its classifications are not mathematically precise or because *some inequality results from its application* (emphasis added)."[27] Likewise in *Village of Belle Terre v. Boraas*[28]the court ruled that a zoning ordinance, which in this case stated that two or more unrelated people could not occupy a single-family residence, was not at odds with the Equal Protection clause as it met the "rational relationship" test of supporting a legitimate government interest. Since the ordinance embodied neither a "suspect" classification[29] nor infringed a "fundamental" right[30], the law was sustained as the type of "economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause, if the law be "reasonable, not arbitrary."[31] (Dale 1976, CRS4-6).

This ruling had implications on future litigation involving the equal protection clause, as the court held that income is not a "suspect classification" and intimates that housing is not a "fundamental right," therefore the courts would not apply more exacting standards to challenges based on the exclusion of housing opportunities for low-income people, only on claims of racial discrimination. If racial discrimination was found, the courts then looked to the "compelling interest

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[24] *United States v. City of Black Jack*, 508 F. 2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1974); *Ammonds v. Dade City*, 783 F.2d 982 (11th Cir. 1983); *Dowdell v. City of Apopka*, 698 F 2d. 1181 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986).

[25] 67 N.J. 151, 336 A. 2d 713 (1975)

[26] 397 U.S. 471 (1970)

[27] 397 U.S. at 473 (1970)

[28] 416 U.S. 1,8-9 (1974)

[29] Black's Law Dictionary defines suspect classification as: "in constitutional law, a statutory classification based on race, national origin, or alienage, and thereby subject to strict-scrutiny under equal protection analysis

[30] Black's Law Dictionary defines fundamental rights as: "A right derived from natural or fundamental law. In constitutional law, a right that triggers strict scrutiny of a law to determine whether the law violates the Due Process Clause or the Equal Protection Clause; fundamental rights, as ennuciated by the Supreme Court, include the right to vote, the right to interstate travel, and the various rights of privacy.

[31] 416 U.S. at 8

that justifies and necessitates the law in question"[32] to determine if the intent of the law was to discriminate.

In *James v. Valtierra*[33], the Supreme Court sustained a California constitutional provision requiring the local electorate to approve construction of low-rent public housing before it began. In so doing, it applied traditional equal protection standards finding, in effect, that the distinction in the law was based on wealth and did not constitute race discrimination despite its asserted adverse impact on housing opportunities for racial minorities. The Court stated: "The Article requires that the referendum requirement approval for any low rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law neutral on its face is in fact aimed at a racial minority." In other words, neither the fact that the state law affected the poor generally, nor that housing interests were involved, was sufficient to invoke strict judicial scrutiny (Dale 1976, CRS-5, CRS-6).

Alan Weinstein writes, "the U.S. Supreme Court all but barred federal court challenges to exclusionary zoning based on the equal protection clause of the federal Constitution. First, in *Warth v. Seldin*[34] the Court imposed stringent standing requirements on exclusionary zoning plaintiffs. Then, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* [35] it required that exclusionary zoning plaintiffs prove that municipal officials intended to engage in racial discrimination (Weinstein 1993, 106)."

Justice Powell delivered the majority opinion of the court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*:

> Our decision last Term in *Washington v. Davis*[36] made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination'. Id., at 242. Proof of racial discriminatory intent of purpose is required to show a violation of the Equal Protection Clause.[37]

The judicial holdings in these cases had significant impact on future exclusionary zoning challenges, and the current ability of environmental racism challenges to use the 14th Amendment to seek relief. The Court rulings in *Village of Belle Terre v. Boraas*, *James v. Valtierra*, *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp*, suggest that "persons whose interests are

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[32] Blacks's Law Dictionary, strict scrutiny
[33] 402 U.S. 137 (1971)
[34] 422 U.S. 490 (1975)
[35] 429 U.S. 252 (1977)
[36] 426 U.S. 229 (1976)
[37] 429 U.S. 252 (1977)

adversely affected by exclusionary aspects of local zoning ordinances have a heavy burden to overcoming the traditional presumption of legislative validity (Dale 1976, CRS-7)."

The Discriminatory Intent Hurdle

The requirements to prove racial discrimination through the use of the Equal Protection Clause as developed in exclusionary zoning cases is perhaps the most significant impediment to litigating environmental justice concerns under constitutional law. As many attorneys involved in environmental justice suggest, the holdings in these cases force communities to prove that the situation they are challenging are the result of an intentional desire to discriminate. This is almost impossible in the realm of government decision-making to find overt evidence of racial or economic class discrimination in siting, housing, or other land use policies.

Although environmental justice litigants have provided courts with evidence showing the discriminatory results of various policies and regulations, the courts have consistently held in terms of the defendant for lack of proving intentional discrimination. The rationale for upholding the intent requirement in these cases was voiced by the Supreme Court in the case of *Washington v. Davis*[38], where the majority opinion expressed the belief that without this requirement, "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the affluent white" could possibly be void. This rationale has held true since this decision was written, suggesting that while the rights granted under the Fourteenth Amendment may seem to provide an outlet for communities to argue issues of unequal protection, they may find it difficult to pursue claims that are not based solely on the suspect classification of race.

The question remains; how to redress discriminatory decisions in land use policies resulting in unfair living standards for low-income communities and communities of color? The fundamental rights of justice, freedom, fairness, liberty and democracy that are the framework of the environmental justice movement are essential to this country's tenet of social responsibility, therefore it is important to seek solutions to this question. However, these fundamental rights differ from the fundamental rights protected under the equal protection clause of the Fourteenth Amendment.

Section III: An Alternative Suggestion: The Amicus Curiae Brief

The links between the claims made by environmental justice advocates, and the claims made by plaintiffs in exclusionary zoning cases, that certain government actions or policies result in

[38] 426 U.S. at 248 (footnote omitted)

discriminatory outcomes based on race and income, provides for a central idea in this thesis. This idea holds that the fundamental questions of land use reflected in environmental justice concerns are so closely connected with the land use concerns expressed in exclusionary zoning litigation, that exclusionary zoning is a category of environmental justice. This connection is drawn out in the working definition of environmental justice as in the context of zoning, which is:

> Any discriminatory decisions in land use policy in the form of zoning ordinances that separate people, places, and work in an exclusionary manner that adversely effects the quality of life of urban residents.

This connection was made in part because of the similarities between the claims made in exclusionary zoning and environmental justice cases. But it also relies on the fact that the outcomes and interpretations of the Equal Protection Clause of the Fourteenth Amendment in exclusionary zoning cases have had an impact on environmental racism cases.

The failure of the use of this Constitutional law in redressing claims of discrimination in hazardous facility siting, housing opportunities, and other locally unwanted land uses, supports the original idea of this thesis, that in order for environmental justice (and therefore exclusionary zoning) to be served through the court system, an alternative to formal litigation should be considered. Sections I & II of this Chapter have shown the difficulties in seeking relief to claims of environmental injustice under environmental and constitutional law. The unequal protection and enforcement of environmental laws which spurs claims of environmental racism can be remedied to a certain degree by challenging hazardous facility siting, but these lawsuits do not often address the principles of environmental justice. While halting additional facility sitings improves the urban environment and empowers a community, these successes in court only treat the symptoms, not the disease. Alice Kaswan, a Professor of Law at Catholic University School of Law, expands on this issue of "bridging the gap" between litigation and environmental justice. In a recent issue of the American University Law Review, she writes;

> "While all of these legal challenges may accomplish the desired end (e.g., they may defeat a proposal to site a locally unwanted land use ["LULU"] in a poor minority neighborhood), they do not directly address the perceived unfairness of the decision-making process or its distributional outcomes. Suits against wetland permits, zoning code violations, or hearing notifications will not, generally speaking, raise the issues of justice that may have motivated the suits. As stated by attorney Michael Gerrard, '[w]here the communities are able to participate in the legal process to fight facilities, often they are required to focus on objectives that are peripheral to their substantive concerns' (Kaswan p.244)."

Kaswan argues "a legal victory against an unfair decision-whether on civil rights or other grounds-

is only one element in the pursuit of the broader social, political, and cultural change necessary to achieving political processes that fairly consider all citizen's interests (Kaswan p.224)."
While environmental justice advocates have turned to the Civil Rights Acts[39], especially Title VIII[40] (known as the Fair Housing Act) because of the less exacting standard of discriminatory impact rather than intent, the use of this route has few precedents. All told, the findings in sections 1 & 2 reflect what many attorneys involved in environmental justice have professed, "that the struggles in the environmental justice movement are primarily political and economic struggles, not legal ones (Cole 1994, 541)."

But if we take it as given that the courts are important public policy making forums, and that litigation is often necessary, the strategies of environmental justice advocates entering this forum should reflect an approach educated by the doctrines established by the courts in exclusionary zoning cases. Owing to the constraints of existing laws, and based on the notion expressed above by Gerrard that the legalese inherent in these suits may take away from the real concerns, the third chapter of this thesis describes an alternative mechanism for communicating environmental justice to the judiciary. This alternative mechanism is the amicus curiae brief, which can provide environmental justice advocates access to the courts without entering into formal litigation.

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[39] In North Carolina Dept. of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6 (1986), a community group successfully used Title VI to pursue a challenge to a freeway siting project. This case ended in a negotiated settlement rerouting the freeway. "This represents the first successful use of Title VI to stop a locally-unwanted land use, albeit at the administrative level (Cole 1994 p.533)."
[40] U.S. v. City of Parma, 494 F. Supp. 1049 (N.D.Ohio 1980)

Chapter Three: Introduction to Amicus Curiae Briefs

> Where there is relatively adequate representation of the basic points of view, the amicus curiae, however, may perform a valuable subsidiary role by introducing subtle variations of the basic argument, or emotive and even questionable arguments that might result in a successful verdict, but are too risky to be embraced by the principal litigant.
>
> - Samuel Krislov, 1962

> One method of reform is to create mechanisms that will give community groups greater access to the courts. It is the leverage accorded by enhanced access to courts, rather than actual litigation, that will serve to correct environmental inequities by removing the economic and political incentives that drive environmental hazards to these communities.
>
> - Eileen Gauna, 1995

From Fourteenth Century Common Law to the Present

Black's Law Dictionary defines amicus curiae (Latin "friend of the court") as:

"A person who is not a party to the lawsuit but who petitions the court to file a brief in the action because that person has a strong interest in the subject matter."

Amicus curiae briefs are documents that are filed by parties interested in providing the court with additional information in a particular case. An amicus can submit a brief before a court's consideration of a petition for writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ.[41] The briefs can take the form of a memo, or a formal document written (often by a lawyer), to express the concerns of a person or a group in terms of a specific case. Anyone can file a brief if it is accompanied by the written consent of the parties. If a party denies consent, a motion for leave to file an amicus brief may be presented directly to the court.[42]

Although briefs are most often filed when a case is at the appellate level, they may be filed at any stage during the history of a case so long as they follow the guidelines for filing specific to that

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[41] U.S. Supreme Court Rule 37

[42] No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of a State, Commonwealth, territory or possession when submitted by its Attorney General; or on behalf of a city, county, town or similar entity when submitted by its authorized law officer.

court.[43] "Higher appellate level decisions frequently have ramifications far beyond the particular litigants to the suit in question. Appellate courts usually welcome amicus briefs filed by nonparties who can apprise the court of broad-based legal, social and economic consequences of a judicial decision (Parlee p.14)."

Initially, the amicus was an impartial judicial advisor called upon only in rare or unique circumstances (Krislov 1963). However, the role of amicus participation has changed significantly since the days of impartiality. The evolution of the amicus brief has followed the increased use of the court system to settle disputes. The literature suggests that amicus may actually play a role in the court's agenda setting, as the court is more likely to hear a case with amicus support because such support suggests the case is important (Epstein 1993).

A recent study of Supreme Court decision-making found that these submissions potentially enable justices to make more precise calculations. This finding is based on the argument that in friend-of-the-Court submissions, organized interests engage in preference delineation, pointing out to the justices where various political actors stand on extant policy (Epstein and Knight p.222). Epstein and Knight note that the litigating parties may also provide this information, but other studies have shown that "since litigants are more likely to be narrowly focused on the case outcomes, the broader policy ramifications of the decision may not be discussed in their brief (Spriggs and Walhbeck, forthcoming)."

A Short History of the Amicus Curiae Brief

Scholars have traced the origin of the amicus curiae back to fourteenth-century Anglo-American common law and Roman law (Lowman 1992). In the United States, the briefs originated in common law as a response to the absence of a mechanism for representation of third-party interests in the adversary system (Smith and Terrell 1995). Smith and Terrell note that "the amicus curiae first appeared in the United States in 1821 when Henry Clay represented the landholding interests of the state of Kentucky in *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).[44]

Clay acted as a "quasi-litigating" amicus curiae in this case, although the term had not been formalized at the time, because he also argued this case before the court. This type of amicus participation, a move from neutrality to interest, or advocacy, develops when an amicus is allowed to participate in oral testimony, arguing for one viewpoint in the case. While the amicus may still operate under the guise of neutrality, the litigating amicus more often adopts the platform of one party in a case and develops their argument accordingly (Lowman 1992).

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[43] These "guidelines" can take the form, as in the case of the federal courts of appeals, as rules listed in the Federal Rules of Appellate Procedure. Each state has slightly different rules governing the use of amicus briefs, and the requirements for filing.

After the 1820s

The role of amicus participation evolved quickly in the U.S. courts since 1823, following vague guidelines that were essentially up to the discretion of court to establish. Krislov marks the shift in the development of amicus curiae in the Supreme Court with the case of *Florida v. Georgia*[45], heard in 1854. As in many current cases involving states as parties in a litigation, the Attorney General of the United States requested permission for leave to file an amicus brief. Counsel for the states subsequently denied the request, so it was therefore up to the Court to decide the matter. The United States was later granted the right to participate by the majority of the court, and has continued to participate in disputes of this nature since that time.

From Neutrality to Partisanship

After the 1920s, states and organizations started to participate as amicus curiae and the use of the briefs began to be seen as an outlet for groups to influence, or lobby the courts. Judges recognized that there were often many public interests impacted by their decisions in a case, and viewed amicus participation as a means to understanding the societal implications of a holding. Epstein and Knight (1999) argue that organized interests-participating as amici curiae- play a role for justices similar to that lobbyists play for legislators: they provide information about the preferences of other actors, who are relevant to that ability of justices to attain their primary goal-to generate efficacious policy that is as close as possible to their ideal points (215).[46] The use of the amicus brief gradually became a major means of affecting social change through the courts and of implementing broad public policies as advocated either by government or private citizens (Re 1984).

The role of amicus curiae has evolved from what today would be called a "special master" to the court, providing technical information to the court upon their solicitation, to an outlet for explaining a different argument then those presented by the litigating parties, to organized interests often supporting both their own beliefs and those of one particular party. Today it is somewhat uncommon to see amicus curiae participation by third parties who do not overtly support one party to a case, as the briefs are now often solicited by the attorney for a party, and written to support that party's brief.

The increased use of this legal tool since the late 1950s is well documented in the literature analyzing interest group participation as amicus. Studies of interest group amicus participation in Supreme Court cases decided between 1958 and 1965 showed that amici participated in about one third of the total cases (Hakman 1966). Subsequent research found that during the 1970's interest

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[44] Smith and Terrell, 1995
[45] 58 U.S. (17 How.) 478 (1854)

groups filed amicus briefs in fifty-three percent of the non-commercial cases decided by the court (O'Connor & Epstein 1982). One decade later, the use of these briefs increased almost thirty percent. A recent survey of the 1996 Term of the Supreme Court found that 204 amicus briefs were filed in the 45 cases analyzed in the study (Schacter 1998).

These studies have generally found that amicus briefs did provide significant information to the courts, were likely to impact the courts decision to hear a case, and in some cases directly impacted public policy. The extent to which amicus participation influences judges and impacts holdings in a case is more difficult to prove. The mere fact that many interest groups have adopted the use of amicus briefs into their general public policy missions suggests to many scholars that these submissions serve as policy-making tools.

Amicus Curiae: Use, Influence and Impact

> "One can argue that these briefs improve, or even 'democratize,' interpretative litigation by expanding the scope of perspectives before the Court. Particularly if we see interpretative cases as presenting the Court with policy sensitive choices in many cases, there can be real fractional advantages to the filing of briefs by engaged and informed interests."
>
> - Jane Schacter, 1998

It is difficult to say exactly how amicus curiae briefs influence the Court. Amici may shape the thinking of the Court, yet remain uncited in the written opinion. Susan Hedman's doctoral dissertation[47] tried to answer the question of influence and impact of amici curiae briefs on the Supreme Court environmental docket. Hedman examined "O'Connor and Epsteins hypothesis that citations of amicus briefs in court decisions serve as "blunt indicators" of amici impact. The study demonstrates that citations are exceedingly "blunt indicators" of amici impact. In fact, only about one-third of the amicus citations in the environmental cases decided by the Supreme Court can be characterized as evidence of interest group impact (Hedman 1991)."

Amici on the Environmental Docket

Hedman reports that there is some data that indicates that amicus briefs filed on the merits of a case influence the court simply by being filed. Caldeira & Wright concluded that:

> Organized interests are generally influential during the Court's agenda phase because they solve an informational problem for the justices...(by) effectively communicating to the

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[46] By "efficacious" policy, we mean policy that other political actors and society as a whole will follow and respect. By "ideal point," we mean the justice's preferred position on the policy.

[47] "Friends of the earth as friends of the Court: Interest groups as *amici curiae* in environmental litigation before the United States Supreme Court" (Ph.D. diss., University of Wisconsin, 1989)

> justices information about the array of forces at play in the litigation, who is at risk, and the number and variety of parties regarding the litigation as significant. (Caldeira and Wright 1988, 1122).

Hedman's (1991) detailed examination of the 14 environmental cases in which the court cited interest group amicus briefs reveals that in five cases the Court cited and rejected arguments by amici, explicitly noting that these amici did not shape the outcome of the case. Citations which indicate strong evidence of impact appear in only five of the environmental cases decide by the Court...approximately 5% of the cases in which interest groups filed amicus briefs.[48] In this study of the Supreme Court environmental docket, Hedman found several cases where the amici were favorably cited by the justices:

> In *Nollan v. California Coastal Commission*[49], a land use case involving the validity of a building permit provision, the Court found for the first time that a takings occurs when there is a "lack of nexus" between land use regulations or development exactions and a valid public purpose. In establishing this legal rule, the Court noted that it was relying on legal authority contained exclusively in an interest group amicus brief. This is strong evidence suggesting that interest group amici had an impact on the Nollan court's majority and, in doing so, had an impact on the evolution of land use law (Hedman 1991).

In *San Diego Gas & Electric Co. v. San Diego*, another takings case heard in 1981[50], Hedman's survey of the court record found that an amicus brief filed by the National Association of Home Builders was influential in the way that Justice Brennan decided the issue of ripeness. "When Justice Brennan cited the NAH's amicus brief as authority in a threshold issue in his landmark dissent, he demonstrated one more way in which an interest group amicus brief might have an impact on the Court (Hedman 1991, 200)." Hedman concludes that this research demonstrates the possibility that amicus briefs influence the Court, but found that the briefs rarely have an impact on the final holding (Hedman 1991).

Interest Group Participation: Railroads, Securities, Minorities and the Environment

> The function of an amicus curiae is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.
>
> -*Kemp v. Rubin*, 187 Misc. 707, 64 NYS 2d. 510

[48] 484 U.S. 469 (1988); 483 U.S. 825 (1987); 471 U.S. 84 (1985); 450 U.S. 621 (1981); 405 U.S. 727 (1972)
[49] 483 U.S. 825 (1987)
[50] 450 U.S. 621 (1981)

Among the private interest groups which were the first to utilize the opportunities of broader access (to the courts) were racial minority groups, securities and insurance interests, and railroad interests (Krislov 1963). Many organizations, both public and private, have established their positions on different issues through the repeated use of amicus curiae briefs at the state and federal court levels. Groups like the American Jewish Council, the National Association for the Advancement of Colored People (NAACP, now NAACP Legal Defense), the American Civil Liberties Union (ACLU), and the Securities and Exchange Commission (SEC), have developed their respective interests before the court through long histories of participating as amicus curiae. Beginning in the early 1970's, environmental organizations such as the Environmental Defense Fund, Natural Resources Defense Council, National Wildlife Federation, Friends of the Earth, Sierra Club and the National Audubon Society, to name a few, started to file amicus briefs (Hedman 1991).

In his extensive study of the history of amicus participation, Krislov analyzes the use of these briefs by civil rights organizations. Krislov writes:

> The identification of the NAACP with amicus briefs is not merely a contemporary one, for that organization has, since its inception, participated as amicus curiae in litigation. An early case in point is *Guinn v. United States*,[51] the famous Grandfather Clause case, where the NAACP justified its participation on the grounds that 'the vital importance of these questions to every citizen of the United States, whether white or colored, seems amply to warrant the submission of the brief'[52] (Krislov 1963, 707).

While a series of "discrete and insular minorities" of a fiscal and commercial nature early found the amicus curiae brief a useful and potent instrument, it was the use of the device by civil rights organizations that drew widespread public attention. The American Civil Liberties Union was most active in this, as in other aspects of fostering minority group activity (Krislov, 1963, 709). An increased reliance on litigation as a means of vindicating minority rights otherwise difficult to obtain through the political process, however, resulted in civil rights organizations such as the ACLU, and the American Jewish Congress, being among the most active filers of amicus curiae briefs over the past few years.[53]

In two cases in which the ACLU participated as amicus curiae,[54] the Supreme Court favorably cited the briefs in the written decision.[55] Pfeffer points out that the court struck down a

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[51] 238 U.S. 347 (1915)

[52] Brief for NAACP as Amicus Curiae, p.2, Guinn v. United States, *supra* note 72.

[53] In Krislov, p. 710, see Sonnenfeld, Participation of Amici Curiae by Filing Briefs and Presenting Oral Arguments in Decisions of the Supreme Court, 1949-1957 11,16 (Michigan State University Governmental Research Bureau, 1958).

[54] Epperson v. Arkansas 393 U.S. 97 (1968) and Metromedia, Inc. v. San Diego 453 U.S. 643 (1981).

[55] Although Hedman concluded that these citations only offered "anecdotal" evidence that amicus briefs can impact the Court.

statute on grounds raised solely in an amicus brief filed by the American Civil Liberties Union (ACLU) and American Jewish Congress (Pfeffer 1981). In the second case, which focused on protections for political speech, the ACLU brief is thought to have been instrumental in attracting swing votes to Justice White's plurality opinion striking down a San Diego billboard ban (Ennis 1984, 607). The ACLU's experience in Epperson and Metromedia suggests that it is possible for interest group amici to have an impact on the Court (Hedman, 1991, 190).

The APA and the SEC: Examples of Involvement

The SEC filed its first brief in 1936 and now participates on average approximately forty-five cases a year (Ruder 1989). Ruder's analysis of SEC participation as amicus revealed that the agency's commitment to utilizing these briefs developed from an understanding that the amicus brief is a policy making tool of great importance (Ruder p.1168). This understanding was based, in part, on the general "success" of the SEC in judicial decisions in favor of the views that the SEC supported. The courts quoted the amicus brief of the SEC in two cases heard in the 1970s, and expressed their regret that the SEC did not file briefs in four cases heard between 1954-1988 (Ruder 1989).

The American Planning Association ("APA"), like the Securities and Exchange Commission, has an amicus curiae committee to establish criteria to determine the types of cases that speak to the policies of the organization, and therefore merit participation as amicus. The 1990 guidelines for intervention as amicus include cases that "implicate APA policy positions," "concern fundamental constitutional principles," "involve new planning/regulatory approaches," or "involve planning/regulatory approaches with undefined legal status." These guidelines essentially mirror those of the SEC, although the reasons for filing briefs are slightly different due to the fact that the SEC has certain powers as a federal agency, and the APA is a membership organization.

Since the Commission's regulatory program relies on the same statutes as those involved in private cases, resolution of legal issues in those cases often affects the Commission's own enforcement and rulemaking (Ruder 1989). The SEC therefore sees the amicus brief as a way to influence rules governing the behavior of the organization, and as a mechanism for communicating their position on litigation involving matters of public interest in line with the policy of the SEC.

The APA and other membership organizations file briefs with the knowledge that some of their members hold various positions of authority. As one employee of the APA noted earlier this year, "we have members in regulatory positions that may be affected by the APA filing briefs in land use cases that are similar to their own local land use planning policies." The APA has only once received complaints from their members that the organization supported the wrong planning position in an amicus brief, suggesting that people outside of the courtroom read these briefs, and

may also consider these briefs important policy documents.

Both the SEC and the APA carefully scrutinize any amicus briefs filed by their respective organizations, as the briefs inform the court of the policy positions held by the groups at the time. Because these briefs are a respected form of communication between these groups and the courts, significant attention is paid to the consistency of the positions taken in briefs filed in different courts throughout the year.

In examining the access to the courts for public interest groups through amicus curiae briefs in England, Australia, and the United States, Loretta Re writes:

> The development of the amicus device has been favoured in the United States by the proliferation in its society of the private non-profit organization which exist to promote at the bar of the courts, before legislatures, and in public opinion, the interests of a class or group and their conviction about the value of some social interest-whether it be the advancement of a minority race, or the advocacy of an environmental or consumer interest. Whereas the wealthy groups and associations were able to exercise considerable political control through political lobbies, the Civil Rights organisations, with few economic resources at their disposal, resorted instead to using the courts to achieve social change by means of amicus curiae (Re 1984).

As has been shown, groups operating under government regulations, such as the SEC, might file amicus briefs in cases addressing questions of law or application of existing law, that would directly impact their operations. Civil liberties groups and other public advocacy organizations often filed briefs both in cases of immediate relevance to the doctrine of their group, and in more general cases that may have lacked representation of different societal interests.

Recognition from the Court

The filing of amicus briefs increased throughout the twentieth century partially as a result of the recognition of the importance of amicus briefs by some judges and justices. As Justice Black noted in regard to a decision to revise the guidelines for filing amicus briefs in the US Supreme Court in 1954:

> Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.[56]

[56] Order Adopting Revised Rules of Supreme Court of the United States, 346 US 945 (1954).

In December 1988, the Court of Appeals for the State of New York added a new announcement[57] to the weekly bulletin presenting new filings, stating "the subject matter of the newly filed cases may suggest appropriate motions and participation which the Court welcomes (Kaye 1989)." Judith Kaye, then Associate Judge for the Court of Appeals in Albany, New York, looked at this invitation to submit amicus briefs as a statement deserving "small fanfare", because in her opinion:

> The cases settle disputes between litigants to be sure, but they may also establish rules and set policies that go far beyond them, profoundly affecting the course of future cases and influencing the conduct of others in society (Kaye p.9).

While amicus briefs have been shown to provide the courts with additional information in a case, that information is sometimes not considered "useful" by the court. "In recent years, the Supreme Court has been flooded with amicus curiae briefs in most major cases involving important constitutional or statutory issues. Many of those briefs contribute nothing significant to the case, but merely repeat, in varying form, the arguments the parties already made. Their major function seems to be to enable organizations submitting them to gain publicity and to be able to advise their memberships after the decision that the Court adopted their views (Friedman 1983)."

Criticism of Amici as Lobbyists and "Parrots"

Criticism of the overuse of amicus briefs that mimic party briefs, or are filed for reasons other than that of a "friend" to the court, was seen most recently in the Seventh Circuit court of Chief Judge Richard Posner in his denial of a motion by the Chicago Board of Trade to file an amicus brief in the case of *John H. Ryan v. Commodities Futures Trading Comm'n*[58] heard in 1997. Judge Posner provided a lengthy explanation as to why he had denied the motion to file an amicus brief, stating, among other things, that justices needed to place restrictions on the use of the briefs to simply repeat the argument of the party. He writes,

> We are not helped by an amicus curiae's expression of a 'strongly held belief' about the weight of the evidence, but by being pointed to considerations germane to our decisions of the appeal that the parties for one reason or another have not brought to our attention.[59]

The amicus brief loses its meaning as a helpful tool to educate the court with new and essential information when it is written with only the opposition in mind. Posner described several situations in which he believed amicus curiae participation should be allowed, or provided reason for their 'desirability' before the court:

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[57] (22 NYCRR §500.11[e]).
[58] 125 F. 3d 1062 (7th Cir. 1997)
[59] 125 F. 3d at 1064

I. When a party is not represented completely or at all,

II. When an amicus has an interest in another case that will be affected, and

III. When the amicus has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.[60]

While the U.S. Supreme Court may accept most motions for leave to file amicus briefs, some state supreme courts are not as flexible. In Arkansas, for example, a case heard in 1983[61] on appeal received a statement from the court similar to that of Judge Posner, causing many future potential amicus to shy away from filing (Marshall 1996). The Court stated, "henceforth, we will deny permission to file a brief when the purpose of the brief is nothing more than to make a political endorsement of the basic brief."[62]

Lawyers and scholars have tried to provide some reasons for votes against amicus participation other than the argument that the sheer volume of briefs filed per case has formed these judicial opinions. "The concern seems to be that parties and their counsel will use amici to present additional arguments they cannot (because of page limitations or for other reasons) fully present in their own briefs-perhaps even ghostwriting and/or financing briefs (Smith 1998)." Smith believes that the real concern stems from the credibility of the organizations filing briefs, and the inability of the judges or justices to discern "good" data from "bad". In some cases[63], the organization filing the amicus brief have the credentials to make empirical assessments that carry more weight than the individual party making the claim (Smith 1998). Other lawyers consider this situation simply the role of the amicus curiae brief, not questioning the neutrality or fairness of what is contained in the documents.

Although critics have noted that the shift of the amicus from a neutral 'friend' to a lobbyist for a certain cause has created briefs that look more like propaganda pieces than thoughtful legal tools, (Rustad and Koenig 1993) Krislov concludes his 1962 article by stating:

Access to the legal process on the part of such organizations is a logical extension of realistic awareness of law as a process of social choice and policy making. Even criticism of the amicus brief as 'political propaganda', court embarrassment at such criticism, and changes in the rules which have hampered such briefs in the short run have not seriously stemmed the growing reliance upon it (Krislov p.721).

Amicus Curiae Brief May Be Useful to the Environmental Justice Movement

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[60] 125 F. 3d at 1063

[61] Ferguson v. Brick, 279 Ark. 168, 649 S.W. 2d 397 (1983)

[62] 169 Ark. At 173

[63] See Jaffee v. Redmond, 518 U.S. 1 (1996)

> The [Court of Appeals] exists, not for the individual litigant, but for the indefinite body of litigants, whose causes are potentially involved in the specific cause at issue. The wrongs of aggrieved suitors are only the algebraic symbols from which the court is to work out the formula of justice.
>
> -Benjamin Cardozo, before he joined the Court of Appeals[64]

Luke Cole suggests that communities facing environmental dangers are in great need of relevant legal research and writing (Cole 1994, 106). He notes four useful ways for this to take place, one of which is writing amicus briefs in environmental justice cases. Cole states:

> Writing scholarly amicus curiae briefs in environmental justice cases can be useful for communities engaged in protracted legal struggles. Amicus briefs are excellent vehicles for discussing the broader policy implications of a particular suit and the historical context of the suit (Cole 1994, 1062).

This research into the history and use of amicus briefs in the courts uncovers many aspects of this legal tool that can be translated into mechanisms for effective participation in the courts. There are several features of amicus briefs that make them relevant in the environmental justice movement. On the technical side, the briefs are significantly less expensive than litigating, and the rules of res judicata and collateral estoppel do not apply to amicus. This means that amicus participation in a case does not bar the filer from appearing as a party in similar litigation in the future. Therefore, community groups can spend less time and money, and communicate their views before the court, without focusing on how an unfavorable outcome may hurt subsequent involvement in the courts.

Local Expertise

On a more substantive level, research has shown that amicus briefs can influence the decision of the court to choose to hear a case because they can present unique issues of importance held by various individuals or organizations. Grassroots organizations with local expertise can file as amici to inform the court that there is an audience and an interest in pertinent litigation, potentially influencing the selection of cases for the docket.

"Because of page limits, or considerations of tone and emphasis, parties are frequently forced to make some of the points they wish to make in rather abbreviated form (Ennis p.606)." Environmental justice advocates can expand on those points that impact their interests specifically, in their own voice, to widen the boundaries of a case to encompass their concerns. The amicus brief can therefore allow communities to inform the court of their interests, and indicate how a holding

[64] Cardozo, The Jurisdiction of the Court of Appeals of the State of New York § 6, at 11 (2d ed 1909)

will impact them specifically. This will help, in the words of Luke Cole, "build the movement," as these briefs can move away from a narrow legal holding.

Providing a Different Perspective

Amicus can make arguments that the party for some reason or another can't make, and are not restricted to presenting the formal legal arguments of a party. Because environmental justice advocates have been unsuccessful in pursuing their claims through existing laws, an amicus brief can allow these groups to voice their beliefs in their own terms, and present alternative arguments that may not be contained in the party brief.

Environmental justice advocates participating as amici can promote an alternative reading of the case. Rather than draw the court's attention to the negative aspects of the situation, the amici can construct a positive argument based on the use of "good" zoning laws that take the place of insufficient environmental laws. The amicus curiae brief offers environmental justice advocates an opportunity to focus their local expertise on educating the court, in their own voice, to offer interpretations of a case that transcends the legalese, without formally litigating.

A Better Means of Communicating Environmental Justice

The grassroots nature of environmental justice seems to lend itself to this flexible form of communication with the court that an amicus brief provides. The legalese of a formal brief often cannot reconstruct the emotions and sentiment that have caused communities to organize in the name of environmental justice. The potential power of the information that people can document from their every day life is important material that only experience provides.

In order to provide a stronger argument for the use of amicus briefs in the environmental justice movement, the next chapter of this thesis will present four exclusionary zoning cases and a summary of the information provided in the amicus briefs for each case. The information provided in these briefs can help explain how other organizations have used these briefs to further their concerns and policies, and to make recommendations to the court for particular rulings.

Each amicus brief was read in light of the brief filed by the party in litigation that they either overtly supported, or appeared to support in their opening summary. In doing so, it is possible to understand how amicus briefs can be used to present different arguments in a care, provide clarity to technical questions asked by the court, and elaborate on issues that a party only mentioned. The ideas presented in these amicus briefs can be used to better understand how this legal tool can be used by environmental justice advocates to communicate with the court in a fashion other than formal litigation.

Chapter Four: Exclusionary Zoning Cases and Amicus Briefs

The Cases and the Criteria for Selection

Amicus briefs filed for four land use cases were collected in order to understand the "exportable" lessons that can be learned from past use of the briefs in litigation. The methodology for choosing each case was fairly straightforward. To be selected, the case had to involve a dispute concerning a zoning ordinance that *as applied* segregated a group or class of people by not allowing equal access to housing opportunities, and that group or class had to have the support of at least one amicus on the record. The initial selection of cases was narrowed down to include two cases heard before the U.S. Supreme Court challenging the constitutional foundation of exclusionary zoning cases, *Buchanan v. Warley*[65] and *Village of Arlington Heights v. Metropolitan Development Corp.*[66], and two cases heard before State Supreme Courts, *Britton v. Town of Chester*[67] and *City of Cleburne v. Cleburne Living Center*[68].

The selection of cases was narrowed down to these four cases from an initial group of ten due to lack of complete records at the various court record libraries, and because these four cases provide a standard representation of the utility of the amicus curiae brief to illustrate additional points not found in the party briefs. Each amicus brief filed in the respective cases was read in light of the brief filed by the party the amicus was essentially supporting.

It is difficult to measure the ability of the amicus curiae brief to influence or impact the decision-making process of judges unless the briefs are specifically cited on the record or in the written opinion. The studies of interest group participation as amici and the literature on this topic do suggest the ways in which some amicus briefs can be more effective or more useful than others. The literature supports the idea that the authors of a brief, say the Solicitor General or a well known lawyer, or the number of times a group submits a brief ("repeat players") can influence the court's decision to allow a brief to be filed (Hedman 1989). Additional literature and interviews with lawyers contribute to the claim that the substance of a brief and the interest of the amicus in filing a brief are also indicators of the essential role that amicus can play in a court proceeding.

As Bruce Ennis points out, amicus briefs are often useful when the amicus and its counsel help the party plan the party's strategy, and can provide research, drafting, and editorial assistance to the party (Ennis 1984). Ennis' work supports one claim of this paper that participation by amicus is important because there are many instances where the parties can't say exactly what they want.

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[65] 245 U.S. 60 (1917)
[66] 517 F. 2d 409 (C.A. 7 1975)
[67] 134 N.H. 434, 595 A. 2d. 492 (1991)
[68] 473 U.S. 432 (1985)

Amici can develop the ideas that the party is forced to make in summary form, or they can make arguments that the party wants to make, but for a variety of reasons[69], cannot make itself (Ennis 1984).

The cases challenge the notion of the fundamental liberty of citizens of low and moderate income, people of color, and people with mental retardation, to acquire property or integrate into communities. In asking the question of what the 14th Amendment accords people, the courts are forced to consider the legitimate governmental interest furthered by the various zoning ordinances. The division of power and purpose between the legislative and judicial branches, and the deference to municipalities through the police power granted them by the state, create many levels within these cases. The amici in these cases therefore serve an important role in helping the court interpret the complexities of these land use cases in the eyes of third parties interested in the case.

Buchanan v. Warley[70]

The facts of the case are as follows[71]: Buchanan, plaintiff in error, brought an action in the chancery branch of Jefferson circuit court of Kentucky for the specific performance of a contract for the sale of certain real estate situated in the city of Louisville at the corner of Thirty-seventh street and Pflanz avenue. The offer in writing to purchase the property contained a proviso that the purchaser, the defendant in this case, was not required to accept that contract unless he had a right, as a colored citizen, under the laws of the city and state to occupy that land as a resident.

Under and by virtue of the ordinance of the city of Louisville, approved May 11, 1914, the defendant would not be allowed to occupy the lot as a place of residence.
The title of the ordinance reads:

> An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.

The plaintiff acknowledged that but for the ordinance, the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. Buchanan attacked the constitutionality of the ordinance that prohibited the purchase of such land by a colored person.

The Court held that the ordinance effectively deprived Buchanan, in violation of the Fourteenth Amendment, of an essential element of his property, -the right to dispose of it to a

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[69] These reasons include pursuing one aspect of law in order to gain standing, only presenting the aspects of law relevant to the case at bar, or providing the court with information in a format free of emotion.
[70] 245 U.S. 60 (1917)
[71] The language utilized to describe the facts of this case are taken almost directly from the case law and the Lexis Headnotes for this case.

constitutionally qualified purchaser, -and may attack the prohibition under the Fourteenth Amendment. The Court found that the ordinance denied Warley the civil right to acquire, enjoy and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment. The ordinance was found to be an invalid exercise of the police power of the state.

The Amicus Briefs

In the case at bar there were three amici briefs filed which support the case of the plaintiff in error. The amici represent the interests of the Baltimore Branch of the National Association for the Advancement of Colored People (NAACP), and a counsel team from St. Louis, Missouri supported by Wells H. Blodgett and Frederick W. Lehmann.

The NAACP Amicus Brief

The NAACP brief mentions segregation ordinances and codes in Virginia, North Carolina, Atlanta, Georgia, and Louisville, Kentucky (the ordinance in question) as they relate to the zoning ordinance passed in Baltimore, Maryland on May 15th, 1911. The brief details case law related to the different ordinances and addresses how the ordinance in Baltimore has resulted in an overcrowding of black residents in one section of town while homes remain vacant in the areas designated for white inhabitants. The brief does not restrict statements to the specific question of the constitutionality of the ordinance in question, but details at length the different aspects of the ordinances passed in other cities with varying approval to suggest how the ordinance in Louisville should be considered by the Court. The author for the NAACP writes:

> To sustain this legislation it is necessary to establish by legal and constitutional method that the colored man is a public nuisance, or that he is a menace to the public health, morals or well being of the community. In what way has this been done? If it has not been done, in what way can it be done? The most virulent advocate of this newly devised scheme of adding burdens to the already overburdened shoulders of black men, could hardly be brought to the point of making such claims.[72]

This brief left the discussion of the intricacies of the Louisville ordinance up to the petitioner, following the notion that briefs should add something new to the record. From the research on effective amicus briefs, it is important to note that this brief contains excerpts from articles written by Charles Bonaparte in the *Baltimore Evening Sun* on August 16th and September 20th, 1913. This may have had some influence on the court, as Bonaparte's administration as Attorney General (1906-1909) was a particularly aggressive one with far-reaching developments in cases involving Negro rights and vindication of federal legislation before the courts (Krislov 1963).

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[72] Amicus brief for the NAACP,p.32

By explaining to the court how segregation has impacted the quality of life for people of color in Baltimore and in other cities, detailing the subsequent cases that overturned these ordinances, and citing the local views of a past Attorney General, this brief expands the courts knowledge beyond Louisville, Kentucky. The filing of the NAACP brief allows the court to understand the importance of the case at bar as it relates to the future of land policy throughout the country. While the brief for the petitioner also lists and mentions segregation ordinances in other cities, the amicus brief for the NAACP goes into greater detail as to how peoples lives have been adversely affected by similar land use controls.

The Blodgett & Lehmann Amicus Brief

The amicus brief filed by Wells H. Blodgett and Frederick W. Lehmann was submitted because "they are counsel in a case of essentially the same nature, pending in the Eastern Division of the Eastern District of Missouri. The city of St. Louis has enacted two so-called segregation ordinances inspired by and patterned after that of the city of Louisville, which is assailed as unconstitutional in the case at bar."[73] This amicus brief is more emotive than the petitioner brief, and follows the NAACP brief in asking the court to consider many societal issues implicit in the equal protection clause of the Fourteenth Amendment. The authors write:

> In virtue of its police power, the State may protect its people against neighbors who are conducting immoral vocations; it may segregate as between public and quasi-public structures and those devoted to purely private uses; and it may assign the factory to one quarter and the home to another. But when it has done all this, may it go farther and enforce segregation between the homes of people who are moral and law abiding, because of difference in social condition? May it segregate as between white men, natural born citizens and naturalized citizens? Or is this sort of segregation applicable only to the negro?[74]

The brief discusses relevant case law concerning marriages and education, and bases some of their views on Plessy v. Ferguson[75], the "separate, but equal" case involving accommodations on trains. In regard to this case, and in light of the case at hand, the authors write, "we are not dealing here with a day's ride for which equal conveniences are provided, but with the acquisition of a home, the concern of a lifetime."[76]

This brief eloquently states the rights of all people in the United States, drawing from the writings of Abraham Lincoln and the author's belief in individual freedom unrestricted by laws that attempt to segregate races to create a subordinate class of people. This brief not only provides the court with information on the impact of the St. Louis zoning ordinance on the residents of that city,

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[73] Amicus brief of Wells H. Blodgett and Frederick W. Lehmann, p. 2
[74] Amicus brief of Wells H. Blodgett and Frederick W. Lehmann, p. 7
[75] 163 U.S. 537
[76] Amicus brief of Wells H. Blodgett and Frederick W. Lehmann, p. 16

but it utilizes the flexible nature of the amicus brief to describe for the court how these ordinances can be viewed in a democratic society. The brief addresses relevant case law and questions of the constitutionality of these ordinances, but the strength of the brief lies in the author's conviction that these types of land use controls are fundamentally wrong. This brief allows the court a broad perspective of the issues that reach beyond the questions directly presented in this case.

Perhaps most importantly, these briefs added a new perspective to this case, as the case was considered on the grounds that the plaintiff's constitutional rights, as a white landowner, had been violated. These briefs drew in the perspective of the rights of the African-American in this case, which would otherwise have not been a part of the record.

Village of Arlington Heights v. Metropolitan Housing Development Corp.[77]

The facts of this case as reported in 429 U.S. 252 are as follows: In 1971 respondent Metropolitan Housing Development Corporation ("MHDC") applied to petitioner, the Village of Arlington Heights, Illinois, for the rezoning of a 15-acre parcel from single-family to multiple-family classification. Using federal financial assistance, MHDC planned to build 190 clustered townhouse units for low and moderate-income tenants. The Village denied the rezoning request.

The original complaint "alleged that the refusal to rezone made housing unavailable because of race, perpetuated segregation, and denied MHDC the right to use its property in a reasonable manner in violation of the Fourteenth Amendment, the Fair Housing Act of 1968[78], the Civil Rights Act of 1866[79], and the Civil Rights Act of 1871[80]."

The 15-acre site leased by MHDC from the Clerics of St. Viator, was to be developed as "Lincoln Green." This plan met the density per acre requirements of the R-5 zone designation sought by the MHDC, but due to federal funding of the project, could only be constructed if the R-5 zone permitted multiple family occupancy. This permission in an R-5 zone was not clearly spelled out in the zoning ordinance of the Village.

The Supreme Court ruled that official action, such as the zoning ordinance, will not be held unconstitutional solely because it results in racially disproportionate impact; proof of racially discriminatory intent or purpose is required to show violation of the Equal Protection Clause. Therefore, a consistent pattern of official racial discrimination was not necessary predicate to violation of Equal Protection Clause. While the court found that the MHDC had standing in this

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[77] 517 F. 2d 409 (C.A. 7 1975), cert. Granted 44 U.S.L.W. 3358 (12/16/75).
[78] 42 U.S.C. Section 3601
[79] 42 U.S.C.A. Section 1982
[80] 42 U.S.C. Section 1983

case, they held that the MHDC failed to discharge their burden of proving that the Village's rezoning decision was racially motivated. The Supreme Court[81] reversed and remanded the case at bar.

The Amicus Briefs

There were two briefs filed by amici in support of the MHDC at the Supreme Court level. One brief was sponsored by the League of Women Voters of the United States ("League"), Illinois, Cook County and Arlington Heights-Mt. Prospect area; the American Jewish Committee ("AJC"), the Arlington Heights Clergy Fellowship and the Minority Industrial Relations Council, Inc. ("MIRC"). The second brief was filed by the American Society of Planning Officials ("ASPO").

The League Amicus Brief

The amicus brief of the League and others was filed because "the amici believe that an amicus brief on their behalf (MHDC) will help to demonstrate the relationship between the issues in this court and the nationwide problem of metropolitan area housing segregation."[82] This amicus brief brought together a variety of national and local interests to support the MHDC. The AJC and the League, whose combined membership totaled 200,000 people in 1975, had had a long history of pursuing equal rights throughout the U.S. They presented research and studies that linked the impact of exclusionary land use practices to inequities in housing, education, and employment.[83]

The Cook County League, Arlington Heights Clergy Fellowship, and MIRC produced local views of the barriers created by land use controls in the suburbs of Chicago. The MIRC is directly impacted by policies that restrict construction of low-cost homes for minorities because Federal law requires the companies that make up this organization to maintain affirmative action hiring goals. For these reasons, the amici promoted their relevant interest in the case at bar, a requirement that is often necessary to gain approval for a motion for leave to file an amicus brief.

This brief focuses on developing the idea of the causal relationship between suburban exclusionary zoning practices and metropolitan residential patterns. The stance of the amici is summarized in one portion of their brief, which reads:

> The restrictive practices of Arlington Heights and similar suburbs consign Chicago to becoming progressively a ghetto area for blacks and minorities. The whites flee to the suburbs and build an effective wall which serves to exclude minorities from their own community and to confine them to the City of Chicago.[84]

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[81] 423 U.S. 1030, 429 U.S. 252
[82] Brief for the League of Women Voters, p.A2
[83] Brief for the League of Women Voters, p.A2
[84] Brief for the League of Women Voters, p.11

The strength of this brief rests in the fact that the views of the MHDC are thereby supported by a variety of interests, but aside from the few comments reported here, the brief is almost an exact replica of the respondent brief, providing little additional significant information to the Court. If nothing else, this brief provides the Court with the knowledge that these groups favor the opinion of the Court of Appeals and express to the Court that the amici are interested in the outcome of cases such as the one at hand.

The ASPO Amicus Brief

The second amicus brief in this case was filed by the American Society of Planning Officials ("ASPO"). ASPO is a "national membership association serving governmental planning agencies and local municipal officials as the national clearinghouse for planning information, and identifies and analyzes important trends in the planning field."[85] The main platform of these amici is the idea that racial discrimination issues that are likely to come before the court will not always involve open discrimination that is unconstitutional on its face,[86] thereby bringing into question the discriminatory intent requirement established by the Court.

The brief discusses the ways in which racial minorities are often adversely affected by zoning policies that were written with the general welfare of all people in mind, not with any discriminatory intent. They developed the idea that the purpose of the ordinance may well be legitimate, but the result has been to unequally impact low-income people. The brief promotes the idea that the Equal Protection Clause of the 14th Amendment is difficult to invoke, as the "motivation or intent" of the zoning ordinance is hard to ascertain, and the effect of segregation that may develop from such ordinances is not necessarily unconstitutional.

This brief provided the Court with information concerning how land use development decisions work in a democratic system of public notice and comment periods and open meetings held when questions of zoning arise. While the brief develops ideas touched upon in the respondent brief, the language used by the amicus has a stronger tone of disapproval for the ordinance impacting the MHDC. The amicus state that they agree that "for the most part petitioners (the Village) have set out a proper picture of the usual zoning review situation. However, this is not a usual zoning case."[87]

The brief calls on the Court to use the "compelling interest"[88] test, which requires strict scrutiny, in determining the Village's refusal to rezone the parcel. The amicus state that,

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[85] Brief for the ASPO, p.2
[86] Paraphrase of the Brief for ASPO, p.2
[87] Brief for the ASPO, p. 18
[88] Black's Law Dictionary defines "compelling state interest test" as "In constitutional law, a method for determining the validity of a law that seems to encroach on constitutional rights, whereby the government's

"communities are not being asked to provide housing for anyone or to discard all existing regulations in deference to low income integrated housing. A proposal to build upon a flood plain, or where public facilities such as sewer and water were not yet available could be validly rejected under the compelling interest test."[89]

Both of the amicus briefs filed in the Arlington Heights case focused primarily on the legal issues at hand, relevant case law, and the planning process of developing comprehensive plans. They both stated that the refusal to rezone the property in question aided in a segregated Chicago metropolitan areas, pulling this evidence from statistical and land use studies.

The briefs developed the idea that the Lincoln Green proposal was partially spurred by the loss of jobs in Chicago to the northern suburbs like Arlington Heights. Lack of public transportation to this suburb and the lengthy commute by car made it difficult for minorities to remain employed at a firm after it relocated. Because there were no low-and moderate-income housing options in Arlington Heights, Lincoln Green would be the first opportunity for minorities to find jobs and residences in the same area.

The ASPO brief further challenges the discriminatory intent standard established in *Washington v. Davis*, urging the Court to consider the economic issues as suspect classifications; not just the racial issue. This brief points to the root of many exclusionary zoning cases, that race and economic class are strongly linked. The brief also urges on the court the concept that an ordinance that is not modified to meet the needs of all people to integrate into new areas should be held invalid.

City of Cleburne, Texas et.al v. Cleburne Living Center[90]

I chose to include this case focusing on excluding a group home for the mentally retarded for several reasons. It was stated in this case that without such homes "the retarded could never hope to integrate themselves into the community"[91] and that this group of citizens was often discriminated against because of general lack of understanding concerning the term "mentally retarded". This case, like the other cases discussed in this thesis, represents the question of how we consider the equal right to housing opportunities for society as a whole. As the brief for the state of Maryland as amicus curiae states, "the interest of mentally retarded persons is tantamount to an interest in liberty, for without group homes in the community the only alternatives for most is institutionalization."[92]

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interest in the law is balanced against the individual's constitutional right to be free of the law, and only if the government's interest is strong enough will the law be upheld; the compelling-state-interest test is used more commonly in equal-protections analysis when the disputed law requires strict scrutiny.

[89] Brief for ASPO, p. 22

[90] 473 U.S. 432; 105 S.Ct. 3249; 1985 U.S. Lexis 118; 87 L. Ed. 2d. 313, 53 U.S.L.W. 5022

[91] 473 U.S. at 439

[92] Amicus brief for State of Maryland, p. 5

This case was heard before the U.S. Supreme Court, March 18, 1985. The facts of the case are as follows: In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intent of leasing it to the Cleburne Living Center, Inc., ("CLC") for the operation of a group home for the mentally retarded. The home would be the residence of 13 mentally retarded adults who would receive constant supervision. The site of the home was zoned "R-3" or an "Apartment House District". Section 8 of the Cleburne zoning ordinance allows "hospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts" as permitted uses in the R-3 zone. The City declared the group home in question a "hospital for the feeble-minded," which required a special use permit for the site. The City of Cleburne, after a public hearing, denied the special use permit. The Supreme Court affirmed the judgment of the Court of Appeals, holding that the zoning ordinance was invalid as applied to the Featherston home.

Amicus Citation in the Written Decision

Justice White delivered the opinion of the court on this case, and maintained that "how this large and diversified group is to be treated under the law is a difficult and technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-formed opinions of the judiciary."[93] White looked for technical assistance in the amicus brief filed on behalf of the American Association on Mental Deficiency ("AAMD"), as was cited in the written opinion of this case. This brief defined the degrees of persons with mental retardation, explaining that only people with "mild" or "moderate" retardation typically lived in group homes. The brief provided the concept that "mild" retardation was often difficult to detect from casual encounters. The AAMD amicus brief may therefore have influenced the court's interpretation of the City's claim that the denial of the special permit was based in part on protecting this group from potential harassment because they would stand out.

The Amicus Briefs

The City of Cleburne case is one in which the amici and the respondent party appeared to work together, at least to some extent, to develop a strong case. Counsel for the respondent cite the amici briefs within their own brief to draw the court's attention to certain important points that are touched upon in the party brief, but are illustrated at length in the amici briefs. This case is an example of a state filing a brief to inform the court of the role of the city as a political subdivision of the state designated to carry out the public policy of the state.

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[93] 473 U.S. at 443

Three amicus curiae briefs were considered for this case.[94] They represent the collective viewpoints of the Attorney Generals from twelve states, and the Texas Department of Mental Health and Mental Retardation ("TDMHMR").

The TDMHMR Amicus Brief

The TDMHMR was created by the state of Texas as an agency authorized to implement public policy pertaining to the mentally retarded under the Texas Mental Health and Mental Retardation Act of 1965.[95] That public policy mandates a preference for normalized community-based living alternatives for the mentally retarded. This policy can be underminded by a local government entity exercising its zoning powers so as to exclude State-authorized group homes from normal residential neighborhoods.[96]

This brief explains to the court that the authority to determine how to meet the needs of the mentally retarded in terms of community-based group homes is a power granted by the State to the TDMHMR and not to local zoning authorities. The amicus, represented by the Attorney General for the State of Texas, goes on to ask the court to consider this case on the more narrow grounds that the contested City zoning ordinance does not rationally serve any governmental purpose, and furthermore that the ordinance expressly goes against the basic Bill of Rights outlined in the MHMR Act.[97]

The strength of this brief lies in explaining to the court the general policies of the State to allow mentally retarded people the "same rights and responsibilities enjoyed by all citizens of Texas", and the desire by the State for the court to uphold the public policies that make community living possible.

This brief condemns the ordinance of the City, stating that this use of zoning to exclude certain uses, and therefore people, is not a valid function of the City through its delegated zoning powers, as the ordinance cannot be found to rationally serve a State interest.[98] The State approves of the 13-bed group home, and informs the court that if the State chooses to permit this home, the City has no authority to second guess the discretionary judgment through its zoning powers.[99] The Attorney General implies that if the City's ordinance is found to be valid in this case it may be challenged by the State at a later time.

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[94] The amicus brief of the Attorney Generals of PA,IA,MI,MN,NH,NJ,OH, and WI restated the views of the other amici, so it will not be referred to at length. The amicus brief filed by the Solicitor General for the United States will also not be discussed. This brief focused on the subject of whether the classifications drawn on the basis of mental retardation are subject to heightened judicial scrutiny under the Equal Protection Clause.
[95] Amicus Brief for the State of Texas, p.1
[96] Amicus Brief for the State of Texas, p.1
[97] Amicus brief for the State of Texas, p. 4
[98] Amicus brief for the State of Texas, p. 10

This brief provides the court with a strong message of their support for the work of the CLC in furthering the public policies of the State, and helps the court understand the interest of the State in cases such as the one at bar. It addresses the issue of a narrow holding and the specific grounds by which this case should be considered.

The Attorney General for the State of Connecticut Amicus Brief

The second brief in this case was filed by the state of Connecticut, and was joined by the states of Arkansas, California, Colorado, Illinois, Louisiana, North Dakota, Rhode Island, Tennessee, and West Virginia. The brief was written by the Attorney General for the state of Connecticut and supported by the Attorney Generals from the respective states. This brief was written to inform the court that these states are committed to reforming past wrongs that have isolated mentally retarded people rather than integrating them into society. Amici States contend that exclusionary zoning which is directed against mentally retarded people as such should be prohibited as a matter of constitutional principle.[100] The brief follows the lead of the State of Texas in its attempt to explain to the court that the interest of the State on the matter of group homes for the mentally retarded can not be furthered under ordinances such as the one at bar.

The amici draw from many studies to provide the court with information on how public perception of the mentally retarded has changed over time. This is particularly important in the case at bar, as the City claimed that one reason for denying the permit was opposition from neighbors. The amici list surveys showing that neighbors of other group homes in various cities also were reported to have had fears of persons with mental retardation before a group home was opened, but that this fears subsided after residents in the community noticed no behavioral problems from the residents of the group home.

Finally, the amici support the brief of the respondent and the other amici in stating that failure to develop this opportunity for housing for mentally retarded people exacerbates "their residential political powerlessness" and maintains a society where these people are a 'discrete and insular' minority."[101]

The Attorney General for the State of Maryland Amicus Brief

The third brief, for the State of Maryland was filed because "group homes for the mentally retarded are essential to the realization of the State's goals."[102] The Attorney General for the State of Maryland wrote the brief in an effort to inform the court of the dire need for communities to host

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[99] Amicus brief for the State of Texas, p. 11
[100] Amicus brief for the State of CT et al. p.2
[101] Amicus brief for the State of CT et al. p.5

group homes as more states (including Maryland) close institutional facilities for persons with mental retardation in favor of "small community living arrangements. The Attorney General informed the court that the zoning ordinance at bar is "unconstitutional as it does not relate to any legitimate zoning purpose and, in fact, is based on unfounded and unacceptable prejudices."[103] The amicus explains that validating zoning ordinances of this sort that specifically exclude persons with mental retardation from living in group homes could make it difficult for the State of Maryland to realize their own needs for such facilities.

The amicus draws the court's attention to the fact that the City's zoning ordinance was "enacted 20 years ago at a time when mentally retarded people were locked away in large isolated institutions" and that the ordinance's exclusion of "hospitals" for the "feeble-minded" reflects the mistaken preconceptions of that time.[104] This brief is perhaps the most passionate of the amici as it explains that the case at hand is important because it addresses the fact that the interest of persons with mental retardation is essential to an interest in liberty.[105] The amicus asks the court to consider the degree to which the City's authority to zone a parcel restrains these historically "politically powerless" people from their right to benefit from the quality of community life which is extended, with the exception of recovering drug addicts, to all other current and future residents of Clerburne.

The Attorney Generals for the twelve States provide the court with detailed information as to how the holding in this case will directly impact the ability of the States to fulfill their public policy goals of integrating persons with mental retardation into normal community life. They also state that if the court rules in favor of the City it would be difficult for these States to challenge similar zoning ordinances in their respective cities in the future. The use of this legal tool presented the court with current definitions of "mental retardation", provided evidence that group homes were essential in other States, and explained the various ways in which the ordinance did not support a valid governmental interest.

Wayne Britton v. Town of Chester[106]

The facts of this case, heard in 1991, are as follows: the Town of Chester, New Hampshire lies in the west-central portion of Rockingham County, thirteen miles east of the city of Manchester. The available housing stock is principally single-family homes. Because of its close proximity to job

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[102] Amicus brief for the State of MD et al. p.1
[103] Amicus brief for the State of MD, p.2
[104] Amicus brief for the State of MD, p.4
[105] Amicus brief for the State of MD, p.5
[106] 134 N.H. 434, 595 A.2d 492 (1991)

centers and the ready availability of vacant land, the town is projected to have among the highest growth rate in New Hampshire over the next two decades.[107]

The plaintiffs in this case are a group of low-and moderate-income people who have been unsuccessful in finding affordable, adequate housing in Chester. They were joined by a builder who is committed to the construction of such housing.[108] The plaintiffs brought a petition in 1985, for declaratory and injunctive relief, challenging the validity of the multi-family housing provisions of the Chester Zoning Ordinance.[109]

The zoning ordinance in effect at the beginning of this action in 1985 provided for a single-family home on a two-acre lot or a duplex on a three-acre lot, and it excluded multi-family housing from all five zoning districts in the town. In July 1986, the town amended its zoning ordinance to allow multi-family housing. Article Six of the amended ordinance permits multi-family housing as part of a "planned residential development" (PRD), a form of multi-family housing required to include a variety of housing types, such as single-family homes, duplexes, and multi-family structures.[110]

A special master, appointed by the court at the trial court level, evaluated the zoning ordinance. The master concluded that on its face, the ordinance permitted the type of development that the plaintiffs argue was being prohibited. The master found, however, that the ordinance placed an unreasonable barrier to the development of affordable housing for low-and moderate-income families. Under the ordinance, PRDs are allowed on tracts of not less than twenty acres in two designated "R-2" (medium-density residential) zoning districts. Due to existing home construction and environmental considerations, such as wetlands and steep slopes, only slightly more than half of all the land in the two R-2 districts could reasonably be used for multi-family development.[111]
The Supreme Court of New Hampshire held that the ordinance's restrictions on multifamily housing ran afoul of statutory requirements that an ordinance promote the general welfare of the community. In the concluding words of the court, the majority held that the zoning ordinance (in general) evolved as an innovative means to counter the problems of uncontrolled growth, and that the town of Chester had adopted a zoning ordinance which was blatantly exclusionary.[112]

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[107] 134 NH at 437
[108] 134 NH at 494
[109] 134 NH at 437
[110] 134 NH at 438
[111] 134 NH at 439
[112] 134 NH at 445

The Amicus Briefs

On appeal from the Rockingham Superior Court, the Home Builders Association of New Hampshire, the New Hampshire Housing Finance Authority, and the American Planning Association ("APA") filed amici curiae briefs in this case. In summary, the amici representing agencies of the state of New Hampshire provided the court with information about the need for housing and the state's interest in supporting housing opportunities. These briefs are not considered further in this case.

The APA Amicus Brief

The APA brief was co-authored by Brian W. Blaesser, Susan M. Conner, Eric Damian Kelly, Stuart Meck, John M. Payne, James M. Rubenstein, Charles F. Tucker, and Norman Williams Jr. As Susan Conner pointed out in an interview concerning this brief, "the strength of this particular brief was based on two facts. The first fact was that the parties in the case were only arguing New Hampshire law, this brief served to fill in the substantive gaps to allow a broader perspective on exclusionary zoning in other states. The second fact is that the brief represents the viewpoints of some of the preeminent land use lawyers and planning scholars in the U.S., which brought a certain expertise and reputation to the issues before the court."[113]

The APA requested permission to file an amicus brief before the court because the organization "has developed a special research expertise in the relationship of sound land use planning to the availability of low and moderate-income housing. In 1986, APA's Board of Directors specially directed that it take legislative and legal action in state courts to establish and enforce fair share housing and land use programs at the state and local levels."[114] This brief provides evidence of national land use studies describing the political dynamics of exclusionary zoning that erects barriers to developers or potential residents of affordable housing. This brief attempts to:

> Assist the court in rethinking the proper nature of a remedy for exclusionary zoning, a remedy that, with appropriate constitutional guidance, can be implemented by the NH legislature and serve as a model for the many states with similar problems.[115]

Exclusionary zoning cases in New Hampshire were not new to the court[116], but the Supreme Court had not settled the issue of regional general welfare in the state, and had not looked at the Town of Chester specifically. This brief explains the concept and application of regional general welfare in terms of the states that adopted such guidelines in the past.

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[113] Interview with Susan Conner, January 10, 1999.
[114] Amicus brief for APA, p.7
[115] Amicus brief for APA, p.7

The brief discussed the regional setting, planning context and regulatory framework of the Town of Chester and detail the development of anti-exclusionary zoning rules in other states to show that a zoning ordinance can strongly influence the supply and distribution of housing over a region.[117] The authors situate the ordinance at bar in the history of planning and zoning developed under the Standard Planning and Zoning Enabling Acts to show the court that it is often up to the judiciary to decide these difficult matters because "the Standard Acts were process oriented, concentrating on the mechanics of making decisions rather than the substantive content of those decisions."[118] This discussion may have influenced the court's decision to rely on the substance of the statutory requirements of the zoning ordinance rather than reaching a holding on constitutional grounds.

The brief provided the courts with studies and case law developed in other states in order to point to the need for judicial intervention if the exclusionary zoning problem is to be solved.[119] The studies describe the difficulties of affordable housing advocates to build coalitions to have their voices heard, and the politics of metropolitan housing concerns. These pieces can help the court understand how local land use decisions have been made, and why they should be reconsidered to reflect the realities of sprawl and increased populations in urban areas.

The case law presented in this amicus brief also describes how certain state courts have rejected the Supreme Court models developed in *Warth v. Seldin* and *Metropolitan Housing Development Co. v. Village of Arlington Heights* as too restrictive in light of how cities have changed. The brief uses the words of Justice Hall in Mount Laurel I, to explain the idea that "zoning should be for the living welfare of the people, not for abstractions such as building types."[120]

In providing an analysis of anti-exclusionary zoning law of the 1970s and 1980s. The amici conclude:

> The consideration involved in such analysis are similar to those involved in equal protection cases. The underlying basic principles are the same: if a governmental body decides to use public regulations such as planning and zoning, it must employ them on behalf of the welfare of all sectors of the population.[121] The state courts, however, true to their long tradition of keeping tight control over land use law, have phrased the leading decisions in the framework of "regional general welfare" rather than equal protection. By doing so, the general proposition in American law on police power regulation of private activity-that to be

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[116] see *Beck v. Town of Raymond*, 118 NH 793, 394 A 2d. 847 (1978), *Stoney-Brook Development Corp. v. Town of Freemont*, 124 NH 583, 474 A 2d. 561 (1984), *Soares v. Town of Atkinson*, 128 NH 350, 512 A 2d 436 (1986), appeal after remand, 129 NH 313, 529 A 2d 867 (1987).

[117] Amicus brief of APA

[118] Amicus brief of APA, p.16

[119] Amicus brief of APA, p.25

[120] 67 NJ 151, 188, 336 A. 2d 713, 732 (1975).

[121] See *Southern Alameda County Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 295-96 (9th Cir. 1970); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669, 696-97 (W.D.N.Y.), *aff'd*, 436 F. 2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

> valid, such restrictions most promote the public health, safety and general welfare- has been transformed to impose responsibilities on towns as well as to give them more power.[122]

The position of the APA throughout the brief suggests to the judiciary that they should become actively involved in enforcing the statutory provisions of the zoning enabling act in the towns and cities of New Hampshire. These areas should comply with the statutory commitment of promoting the general welfare by making low-cost housing opportunities a reality. This brief provides the court with extensive rationale for a holding that does not completely invalidate the ordinance, but rather remands the case to the trial court for consideration of the remedies outlined in the brief.

This is an example of the ways in which an amicus brief can provide information to the court by individuals who have experience in, and have studied aspects of, matters clearly related to the case at hand. While the brief clearly supports the plaintiff's challenge to the city, it offers the court insight into the politics of the planning and zoning process that may assist the judges in determining their role in deciding the legislative function. Because the courts have traditionally given deference to the municipality, this brief illustrates how the intervention of the judiciary in the case at bar may serve to enforce anti-exclusionary policy and provide the court with greater guidance if similar cases arise in the future. This document is an example of the pursuit of policies through the filing of an amicus briefs.

Conclusions from the Briefs

The amicus briefs in these cases support the claim that such briefs can be a useful tool for environmental justice advocates in lieu of direct litigation. These briefs can communicate ideas that might otherwise not be addressed in litigation. This chapter illustrates that land use cases involving the legitimacy of zoning ordinances have many layers and interests. Such intricacies may be difficult for judges to draw out from the facts presented by the parties to the lawsuit.

The gaps in party briefs can be filled by amicus briefs that transcend the arguments developed by the litigants. The amicus brief can provide additional definitions, studies, and expertise, and address the important issues of individual freedom and liberty that places these cases in the broad societal framework from which they originally developed. The amici play a significant role in these particular cases by drawing attention to the "lessons learned" from planning and zoning techniques throughout America. The utility of these particular briefs was examined in light of the three questions for effective advocacy posed by Cole (1992) and quoted at the end of Chapter Two, (see above) the literature on what makes an effective amicus brief, and the work of Paul Smith.

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[122] Amicus brief of APA, p.31

Paul Smith[123] cites four different approaches that may produce useful amicus briefs. The strategy for using one of these models over another depends on the specific case, and in some cases it may be best to utilize parts of several of these ideas. These approaches are:

1. A Brief that Makes the Main Legal Argument. In some cases, depending on who is representing the party whom the amicus is supporting and on the quality of the legal arguments the party is likely to present, it is essential to devote most of the amicus brief to an improved version of the main legal argument.

2. A Brief that Makes an Alternative Legal Argument. Occasionally, it makes sense for an amicus to offer a legal argument that is entirely different from the one presented by the party. Sometimes, counsel for amici will conclude that the party is not putting its best legal foot forward. In other cases, differences between the interests of the party and the amicus will prompt the amicus to try to modify the court's legal analysis to favor the distinctive interests of the amicus. Of course, it makes no sense to present an argument when the case is in a procedural posture that would prevent the court from adopting it. But that often is not a problem, especially when an amicus is supporting an appellee.

3. A Brief that Emphasizes the Practical Impact of a Particular Legal Rule. Often, amicus briefs usefully describe for the court other pending litigation that will be affected by the outcome of the appeal. This can include one case in which the amicus is involved or an entire category of cases pending in many courts. Such descriptions can influence courts by informing then about the breadth of the impact of their decision, as well as possible variations among the cases that may require refinement of the legal analysis.

4. A Brief that Provides Factual Information Relevant to the Resolution of a Legal Issue. As noted, many amicus briefs focus on descriptions of research or other factual matieral that informs the court about the "real world". Almost always, such statements of facts are supported by citations to published nonlegal authorities (Smith 1998, 4).

Each of the amicus briefs filed in these cases reflects some aspect of these various approaches.

The amici in the *Buchanan* case draw out a different perspective focusing on the rights of the African American buyer, rather than the property rights of the white seller. In so doing, they propose an alternative argument based on the Fourteenth Amendment that addresses the root of the problem at hand, rather than a narrow view of the issues before the court. The Blodgett & Lehmann amicus brief emphasizes the practical impact of a particular legal rule by explaining to the court that they are involved in a similar case in their state, therefore the ruling of the court could impact their ability to further their efforts to invalidate the zoning ordinance that segregates their city.

The amici in the *Arlington* case provided factual information to the court in the form of studies, and developed the idea that the zoning ordinance in question had implications beyond the boundaries of the village. The ASPO amicus brief provided an alternative legal argument, and addressed the issues of discrimination that can result from an ordinance, whether intentional or not.

[123] Attorney for the law firm of Jenner & Block

By analyzing this case in terms of their own policy positions on land use and housing, they informed the court how a narrow ruling on this case would directly impact the interests of their organization.

The idea of using these briefs to inform the court of the public policy interests of third parties is also seen in the amicus brief of the TDMHMR in the *Clerburne* case. This brief does not present an alternative legal argument, so much as it presents an alternative understanding of the local police power of zoning. This brief provides factual information to the court by describing the various mechanisms in place in the state of Texas to integrate persons with mental retardation into various communities.

The Attorney General briefs provide the court with factual information pertaining to the legitimate governmental interests of these states to "right past wrongs" through policy initiatives to provide equal housing opportunities to mentally retarded people. These briefs explain to the court how a ruling for the City will negatively impact the policies of the respective states by setting a precedent that goes against their efforts. They address the root of the societal problem to exclude people with mental retardation, and provide evidence that integrating these people in their neighborhoods has been successful. The esteem of the authors filing these briefs on behalf of the liberty of the people that would be excluded informs the court that there is a large, well informed audience in cases such as the one at bar.

The brief for the APA provides significant factual information to the court, and presents an alternative argument focusing on the statutory, rather than the constitutional, aspects of the *Britton* case. Although it is unclear from the written decision that the court's approach in this case was guided by the APA brief, the final ruling on statutory grounds was a departure from the way courts had examined exclusionary zoning cases in the past.

Exportable Lessons

There are several lessons that can be learned from these briefs that can be exported to support the use of this legal tool in the environmental justice movement. First, these briefs provide outlets for organizations to express their policy interests in terms of the potential outcomes of a specific case. While grassroots organizations may not have specific policies per se, these groups have specific principles that can be affected by the rulings in a case. These groups can support their legitimate interest in these cases before the court by explaining how the furthering of their beliefs will be impacted by the outcome of the case in question.

Second, the amici in these exclusionary zoning cases generally present different perspectives than those developed by the parties directly involved. Community groups have local expertise and unique experiences that can only come from living in neighborhoods. The perceived impacts to the health and safety of the people in a neighborhood polluted and contaminated by industrial or

hazardous use may support the claim that any additional facilities will only cause the situation to worsen. This may help the court understand the broader implications that one additional facility, which appears innocuous, will have on the community.

Third, the amicus briefs have been shown to be able to fill gaps in the technical or legal arguments presented in a case. Because risk assessments and environmental regulations do not take cumulative effects into account, the technical information provided in a case might not address the distributional hazards associated with certain industrial land uses. Stories of community organizing, and personal experience, has shown that community groups often conduct neighborhood surveys to compile data on residents' perceptions of the hazards in their environment. In some cases, individuals in a community have recorded the time and date associated with noxious fumes, an exacerbation of asthma, burning eyes, and other health problems. These records are often kept to compare observations with others in the community to connect the problems and the particular industrial processes. These records could be useful in filling a gap in a party's claim that only addresses issues of aggregate pollution. This information could be helpful in explaining why these claims are pursued in the name of justice.

Finally, the amicus briefs in the four exclusionary zoning cases provided alternative interpretations of the legal arguments presented in these cases. The use of alternative interpretations can support the rationale for using relative standards to judge land use controls in terms of societal changes since an ordinance was drafted. Several of the briefs explain archaic prejudices and fears that still influence land use restrictions. Environmental justice advocates filing amicus briefs might address similar issues of unfounded prejudice that have impacted their civil rights, and explain how true democracy is furthered by efforts to change discriminatory trends. The use of amicus briefs by environmental justice advocates is one way in which groups can participate in legal decisions that could in turn impact their quality of life.

The final chapter of this thesis illustrates the points discussed in this chapter in terms of an environmental justice case, and the issues that might be expressed in an accompanying amicus brief.

Chapter Five: Outlining the Points of an Amicus Brief:

The South Bronx Coalition for Clean Air, Inc. v. Conroy,[124] 20 F.Supp.2d 565 (Sept. 8, 1998)

This chapter examines an environmental justice case to describe how environmental justice activists could draft an amicus brief in the case. The case, *The South Bronx Coalition for Clean Air, Inc. v. Conroy*[125] was heard before the United States District Court, S.D. New York in 1998. The plaintiffs, supported by the New York City Environmental Justice Alliance, Inc., lost the case for a variety of reasons. Two of these reasons, the failure to make prima facie[126] showing of disparate impact, and allegations found to be conclusory[127] because they lacked detailed information in the complaint, are important to consider in terms of how an amicus brief could be drafted. These "failures" represent gaps in the complaint that could have been filled by an amicus brief. It is impossible to know how the court would have ruled given amicus participation in this case, however, it is safe to speculate, given the holding of the court, that the case for the plaintiff might have been stronger had additional information been provided to the court. The points made by potential amici are italicized.

The Background of the Case[128]:

The Harlem River Yard

This case arises out of a plan to develop the Harlem River Yard ("the Yard"), a 96-acre facility located in the South Bronx in New York City. The Yard formerly served as a rail yard for the New Haven Railroad, but fell into disuse following the merger of the New Haven and Penn Central railroads in 1972. In 1991, the New York State Department of Transportation ("DOT"), leased the Yard to defendant Harlem River Yard Ventures ("HRYV"), a private developer, for development of a multi-use industrial facility. In 1993, HRYV submitted a final land use plan to the DOT for development of the Yard that provided for, among other things, an intermodal freight terminal

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[124] The **plaintiff group** in this case included: The South Bronx Clean Air Coalition, Business Labor and Community Coalition, Inc., Urban Alliance, Inc., Cherry Tree Association, Inc. and New York City Environmental Justice Alliance. The **defendant group** included: E. Virgil Conroy as Chairman and President of the Metropolitan Transit Authority and of the New York City Transit Authority and Manhattan Bronx Surface Transit Operating Authority, and of the Long Island Railroad, Hon. George Pataki, as Governor of the State of New York, Joseph H. Boardman as Commissioner of the New York State Department of Transportation, the New York State Urban Development Corp., John Cahill as Commissioner, New York State Department of Environmental Conservation, Hon. Carol M. Browner as administrator of the United States Environmental Protection Agency, Hon. Rodney Slater as United States Secretary of Transportation, Harlem River Yard Ventures, Inc., the New York Post Company, Inc., and USA Waste, Inc.

[125] 20 F.Supp. 2d 565

[126] Black's Law Dictionary defines prima facie ("at first sight") as, "on its face; apparently. True or valid on first impression; evident without proof.

[127] Black's Law Dictionary defines "conclusory" as: "expressing a factual inference without stating the underlying facts on which the inference is based <the plaintiff's allegations were merely conclusory and lacked any supporting evidence>."

[128] Some of the facts of this case are taken directly from 20 F.Supp 2d 565

comprising of 28 acres, a 3,000 ton per day truck-to-rail solid waste transfer facility on five acres, a paper recycling plant and substantial warehousing. The plan was the subject of a Final Environmental Impact Statement ("FEIS") prepared by an outside environmental consultant for HRYV that was submitted to the DOT in December 1993, and approved May 1994. The FEIS concluded that trucks and other sources of air emissions associated with all the uses set forth in HRYV's land use plan would not have any significant adverse effect on air quality in the Bronx.

On September 15, 1997, the New York State Department of Conservation ("DEC") issued defendant USA Waste a permit to construct and operate a 3,000 ton per day solid waste transfer station to be located within the Harlem River Yard site. In conjunction with the issuance of the permit, DEC issued a "Findings Statement" concluding that although the overall "footprint area" of the USA Waste facility would be larger than contemplated by the 1993 FEIS, this difference would "not result in significant adverse environmental impacts, and will have some additional benefits."[129]

The Walnut Depot

Located adjacent to the Yard is the Walnut Depot, a two-story, 338,000 square foot building. The building was originally constructed as a warehouse in 1931. In 1981, the Federal Transit Administration ("FTA"), provided the New York City Transit Authority ("NYCTA") with $13 million dollars to convert the property into a bus garage, material storage facility and bus training school. The Manhattan Transit Authority ("MTA") no longer receives any federal funding and was depleted of its last federal operating funds in 1997. MTA has already determined that the Walnut Depot was functionally and operationally obsolete as a bus depot and had decided to replace it by reconstructing the Coliseum Bus Depot in a different section of the Bronx. The Walnut Depot site has been subleased to the New York Post to develop a new color printing press. A full Environmental Assessment Form ("EAF") was prepared by an environmental consultant, and concluded that the use of part of the Walnut Depot site for a printing press would have no significant environmental impact beyond those that had been examined in the 1993 FEIS.

The plaintiffs claim that the events connected with the sale of the Walnut Depot property will have deleterious effects in the South Bronx. Specifically, they claim that the re-routing of buses from the Walnut Depot to the Coliseum Depot will result in 1,800 extra bus miles traveled per weekday, generating more pollution in the South Bronx. The plaintiffs also claim that the expansion of the USA Waste waste transfer facility, will create a situation in which minority residents in the South Bronx are more subject to the noxious effects of garbage than the mostly white residents of Long Island. Plaintiffs' claims are based on allegation that MTA, in its role as the Long Island

[129] See Affidavit of Anthony M. Riccio Jr. dated August 5, 1998

Railroad, entered into certain agreements restricting the handling and transportation of solid waste in Queens and on Long Island. Plaintiffs allege, upon information and belief, that these actions "are part of a policy of the defendants...to site obnoxious environmental activity only in minority neighborhoods and to exclude such activities from neighborhoods occupied by white residents of the State."

The Holding of the Court:[130]

Environmental organizations sued state and federal authorities and private companies to enjoin, under the National Environmental Policy Act (NEPA), Title VI of the Civil Rights Act of 1964, and State Environmental Quality Review Act (SEQRA), state transportation authority's sale of bus depot and plans for solid waste facility. Defendants moved to dismiss. This district court held that: (1) there was insufficient federal control of bus depot transaction to reach threshold of NEPA application; (2) Title VI claim of intentional discrimination failed to state cause of action; (3) Title VI disparate impact claim failed to make prima facie showing; and (4) ancillary jurisdiction over pendent SEQRA claim was inappropriate. For those reasons, plaintiffs' motion for a preliminary injunction was denied and defendants' cross-motions to dismiss the complaint are granted. The Clerk of Court was direct to close the case.

Outline for an Amicus Brief to Support the Plaintiffs' Claim

South Bronx represents a familiar scenario in environmental justice litigation. First, environmental justice concerns are difficult to remedy through legal challenges, and second, there is almost always an inherent imbalance in available resources between community groups and large corporations or government agencies. In this case, the plaintiffs' claim is supported by two New York lawyers arguing against the defendant's legal team of ten lawyers from high-profile firms in New York City, the Attorney General Office of the State, and the U.S. Attorney's Office. An amicus brief filed under such conditions may be particularly important in informing the court of the broader public interests and audiences involved that support the claims of the plaintiff.

How might an amicus brief be written in this case to assist the court in rethinking a proper remedy in favor of the plaintiff's claims of environmental injustice? Based on the holding of the court in *South Bronx*, there appears to be several ways in which an amicus brief could broaden the court's understanding of the plaintiffs' concerns beyond narrow legal grounds, and help to fill gaps in the plaintiffs' claim. The loosest argument in the plaintiffs' allegations is the violation of Title VI of the Civil Rights Act. An amicus brief in this case could therefore provide information as to the root

[130] Holding taken from 20 F.Supp.2d 565 (Sept. 8, 1998)

of the problems in the South Bronx, or any other city, which might in turn support these allegations more completely for the court. The following is an outline of the ideas that could be expressed in an amicus brief.

Grounds for Obtaining Leave to File an Amicus Curiae Brief:

In this case it is assumed that the plaintiffs would give an environmental justice group written permission to file an amicus brief on their behalf. The motion for leave "shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable."[131] In this scenario, the hypothetical environmental justice group could be the Bronx Neighborhood Association ("BNA") *concerned with urban air toxics, clean buses for the Bronx, and development and the environment. This group, as part of the Greater New York City Environmental Justice Network, is dedicated to solving public health and environmental problems in low-income communities and communities of color throughout New York City. The New York City Environmental Justice Network is a diverse group of organizations based in city neighborhoods and residents of affected neighborhoods in New York City that share technical information and resources to support each other's struggles and coordinate joint activities to address regional and city-wide issues.*[132]

As part of the New York City Environmental Justice Network, the BNA is committed to solving environmental injustice by organizing for clean, safe and healthy communities throughout the city. The principles of the group are based on the idea that a livable community is a civil right, therefore this group desires to file a brief to ensure the mutual respect that the South Bronx residents deserve. This group will be affected by the outcome in the case at bar as the group's mission is to promote equity and justice in neighborhoods in the Bronx that have historical borne a greater burden of wastes generated by New York City and Long Island residents.

The amici are interested in filing a brief to explain to the court how this project will further disadvantage the group, should the court rule in the defendant's favor. Because the group interests also include organizing for pollution-free MTA service in the city's low-income communities and communities of color, the court's holding in this case will have a significant impact on the ability of the BNA to further its organization goals of promoting these efforts. As amicus in this case, the BNA believes it can be of assistance to this court by providing additional briefing that materially adds to and complements the plaintiffs' brief.[133]

Content and Form of the Amicus Curiae Brief:

In an attempt to broaden the court's understanding of the perceived problem in terms of environmental justice and equity, this amicus brief could focus on explaining the layers of this problem and filling gaps in the plaintiff's claim. The plaintiff's claim is primarily centered on the

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[131] Federal Rules Appellate Procedure 29

[132] Based in part on the mission of the Greater Boston Environmental Justice Network

[133] Based in part on Cal. Prac. Guide Civ. App. & Writs Form 5:J.1

violation of procedural requirements under NEPA. Therefore, the court is provided with little substantive information to support the allegations that low-income communities and communities of color in the Bronx have been denied, as a result of the defendant's actions, benefits that more affluent, white residents have enjoyed.

Drawing on the local expertise of the community, the brief could provide this information by: (1) showing maps and "data" depicting land use patterns and related demographic information, (2) explaining the negative impact of these land uses on the residents quality of life, as opposed to relying on technical environmental assessments, (3) explain the shortcomings of environmental regulations which set facility-by-facility standards, rather than protecting people from the cumulative health impacts of residing near multiple facilities, and (4) explaining the principles and goals of environmental justice initiatives and programs throughout the South Bronx to bring greater accountability to these legitimate concerns. The brief could begin as follows:

In collaboration with the Greater New York Environmental Justice Network, the BNA has spent the last several years working on a community mapping project of the South Bronx neighborhoods which include community narratives and historical information describing the development of the Bronx. The series includes maps showing racial and ethnic composition in South and southeastern Bronx neighborhoods from 1950 to the present. A second map in the series shows all of the industrial and hazardous facilities and MTA facilities in the South Bronx, along with housing projects, schools and churches. When these maps are overlayed, it is clear that these neighborhoods, with high concentrations of low-income residents and people of color, have historically been designated as areas to site hazardous facilities and polluting bus depots.

Due to the general concern that their neighborhoods are shouldering the wastes created in Long Island, the group has attained a list of all transfer stations in Nassau and Suffolk County and their general locations. As part of the Freedom of Information Act, the BNA had compiled information regarding the volume of solid waste transferred and volume of solid waste generated for transfer stations throughout New York City and Long Island. While this information shows that Staten Island has historically been home to a large portion of the city's wastes, it is also clear that the while Long Island has a few small transfer stations, the majority of the volume of waste generated in Long Island and Queens is shipped to transfer stations in the Bronx. The information also shows that the small transfer stations on Long Island are located in sections of Nassau and Suffolk counties that are removed from residential areas. This information could provide the court with substantive evidence that may support the disparate impact requirements crucial to supporting the plaintiffs' claim that the project is a violation of the Civil Rights Act.

The amicus brief could include additional asthma statistics for various parts of New York City and information about asthma programs throughout various neighborhoods. This information could be used to explain how these programs have tried to enhance the quality of life of inner-city residents, and how a new facility will negate these efforts. The brief could educate the court as to how residents are impacted by patterns of consistent industrial uses in their neighborhoods that

violate their rights to an equally safe, or "safely" polluted environment. The brief can inform the court of the difficulties in proving the relationship between polluting facilities and health effects, but they can submit information to show that where they work, learn, and live will be impacted by the cumulative impact of additional polluting industry. An amicus brief could tell the court about the different public health initiatives and campaigns currently in place in the community to help residents identify and address issues that affect the health of the community. This could articulate the interests of the amicus in relation to the plaintiffs' claims in this case. Finally, the brief could instruct the court as to how community groups could benefit from participating in the environmental impact assessment, review, and decision-making process. These efforts can be explained in the brief as part of the larger goal to build environmental leadership to work toward social and economic justice for their families.

An amicus brief written in this fashion would inform the court of the broader public interests involved, and the broader implications of a particular ruling in terms of this organizations principles. By explaining the programs and initiatives to create a livable community, this brief explains how the ruling of the court will impact the resident's ability to realize a higher quality of life. The brief therefore allows environmental justice groups to go beyond the narrowly focused legal claim of the plaintiffs' allegations. This brief would provide the court with additional environmental, demographic, and public health information pertaining to the subject locations and the greater Bronx areas. This information could show why environmental justice concerns are not only legitimate, but should be carefully considered in terms of the impact of governmental policies to exacerbate or remedy these concerns. The map series and materials describing organizing projects and campaigns may fill gaps in the plaintiffs' claim. Finally, by expressing the goals of this community group, this brief may expand the court's understanding of the practical outcomes of the case at bar in terms of environmental justice.

Conclusions:

> "The strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not gotten the spirit of liberty."
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> -Alexis de Tocqueville, "Democracy in America"

This thesis describes a few aspects of the difficulties in litigating the principles of environmental justice in order to purpose an alternative approach that allows groups to enter the public policy forum of the court system while avoiding the confines of litigating. First, the thesis points out the impediments to litigating perceived environmental injustice through environmental

laws and the Fourteenth Amendment of the Constitution. These impediments were examined by illustrating the shortcomings in environmental laws and regulations to address the substantive issues of environmental justice. An analysis of the discriminatory intent requirement of the Equal Protection Clause of the Fourteenth Amendment was provided in order to show the relationship between the difficulties in pursuing environmental justice claims in the court, and the claims brought in exclusionary zoning cases. These difficulties were brought out in order to show that environmental justice issues are not necessarily legal issues, but rather political and economic, therefore the use of amicus briefs by environmental justice activists may be better suited for educating the judiciary about environmental justice than a narrow legal claim. Defining environmental justice for the courts through these briefs may help legitimize community concerns for a clean and safe environment as a right, explaining how a particular outcome in a case could either further, or reduce, these concerns.

The idea to participate as amicus curiae in pertinent litigation draws on the potency of local expertise and the inadequacies of existing laws to bring justice. Four exclusionary zoning cases and their respective amicus briefs illustrate the information these briefs contain. The amici provide different language, perspectives, and positions from the views presented by the litigants, and offer evidence of the benefits of this legal tool. These benefits of using these briefs in lieu of litigation include:

I. The opportunity to express policy interests and perspectives to the court to show how organizational policies will be impacted by a specific ruling;

II. Explaining to the court the broader implications of a ruling on groups other than the parties in the litigation;

III. Filling gaps in the technical or legal arguments in the case to provide the court with substantive information that may assist the court in developing a more educated ruling; and

IV. The opportunity to express an alternative interpretation of the legal argument presented by the parties, to assist in addressing unanswered questions of law.

This final chapter illustrates a few ideas that could be included in an amicus brief by a community group to support and promote justice in decision-making processes that may adversely impact certain neighborhoods. The *South Bronx* case is an example of the importance of these briefs in informing the court of the various interests influenced by the court's holding. By proving additional information to support the plaintiff's claim, this brief may help the court understand the larger concerns of this community outside of the issues expressed in the legal challenge. Although every

case is unique, the basic ideas expressed in the amicus brief for the BNA support the idea that these briefs, coupled with effective organizing campaigns, can expand the court's understanding of the historical roots of problems expressed as environmental injustices.

Judges and community groups can benefit from the information provided in a written account of successful organizing around land use issues. The filing of an amicus brief by one community group not only strengthens the case for another group by supporting their efforts, but in filing the brief the group creates a record of its involvement before the court and for future efforts within that community. This can illustrate for the court the beliefs and realities that motivate environmental justice advocates, and can provide added insight into unsettled aspects of land use law.

Because environmental justice has rarely been brought to the court as the sole reason for litigating, the judges may not know the extent to which their decisions can shape the urban environment. These gaps in understanding may be filled by thoughtfully written amicus briefs that describe the practical applications of the principles of environmental justice. Due to the local nature of land use decisions, and the local police power to establish zoning ordinances, grassroots organizations can play a pivotal role in providing the court with their own local expertise.

Pursuing environmental justice through these briefs as part of community's organizing strategy may result in more successful outcomes in litigation than cases in the past, and can alter the way in which environmental justice is understood by the court and other policy makers in the future. The use of amicus briefs by environmental justice advocates to communicate their concerns to the public-policy making forum of the court is one way in which groups can participate in decisions that impact their quality of life.

Environmental justice should be viewed as more than a response to alterations of some people's physical landscape by environmental burdens. A call for justice requires us to consider the environment as a social, cultural, economic, and physical setting that is jointly shared and protected by all people. While the environment conjures up pastoral images for some, the reality is that most aspects of the environment are controlled through policies and regulations, be they land use laws or Clean Air and Water Acts.

It follows then that an environmentally just society is one in which people have the right to participate, reform, and enforce, in some capacity, the regulations that shape the way they live. As William Shutkin concludes in his article "The Concept of Environmental Justice and the Reconception of Democracy":

> The concept of environmental justice ultimately moves us closer to a conception of ourselves as a democracy that we have always held but never lived up to. Environmental justice tries to change, or rather perfect, prevailing conceptions of democracy so as to change the norms of conduct that go along with them, and to change practical activity as a

> whole. By striving to empower individuals and communities to participate in and take control over decisions that affect their health and environment, environmental justice is an effort to redeem the most aspirational aspects of the environment-democracy symbol—self-realized individuals and self-regulating communities. Thus, environmental justice is both the occasion for and the concept of our most progressive, dynamic approach to date to the ideal of democratic governance (Shutkin p.588).

The basis for proposing the use of amicus briefs in environmental justice cases, and the motivation for many of these communities to form and focus on gaining "political and legal authority" over their neighborhoods, is self-determination. A constant theme in environmental justice campaigns is that the independence to choose the fate of a neighborhood is taken away when local decisions are made without input from community residents. The free will to determine what communities will live with and without is often lost in the politics and economics of land use and environmental decision-making. This interpretation of the urban environment, contained in a written document to a court, may assist the judges in understanding why these concerns are labeled injustices, rather than simply problems.

Appendix A

Principles of Environmental Justice
Adopted October 1991, Washington, D.C.

1. *Environmental justice* affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.

2. *Environmental justice* demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.

3. *Environmental justice* mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.

4. *Environmental justice* calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.

5. *Environmental justice* affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

6. *Environmental justice* demands the cessation of the production of all toxins, hazardous wastes, and radioactive material, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.

7. *Environmental justice* demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement, and evaluation.

8. *Environmental justice* affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.

9. *Environmental justice* protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.

10. *Environmental justice* considers governmental acts of environmental injustice a violation of international law, the Universal Declaration of Human Rights, and the United Nations Convention on Genocide.

11. *Environmental justice* must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.

12. *Environmental justice* affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural area in balance with nature, honoring the cultural integrity of all communities, and providing fair access for all to the full range of resources.

13. *Environmental justice* calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on

people of color.

14. *Environmental justice* opposed the destructive operations of multi-national corporations.

15. *Environmental justice* opposed military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16. *Environmental justice* calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17. *Environmental justice* requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.

Appendix B

Environmental Equity/Racism/Justice Chronology[134]

- **1967**- An African-American girl drowned at a poorly run solid waste landfill in an African-American neighborhood, there were riots at Texas Southern University in Houston.

- **1968**- The National Advisory Commission on Civil Disorders reported that the systematic neglect of garbage and sanitation services in inner-cities contributed to urban disturbances.

- **1979** – A non-scientific study of black life in Houston, Texas, reveals that all of the city-owned municipal solid waste landfills and six of the eight garbage incinerators are located in black neighborhoods.

- **1982** – State officials decide to locate a PCB landfill in predominantly black Warren County, North Carolina. Residents rise up in protest. The civil rights arm of a major U.S. Protestant denomination, the United Church of Christ's Commission on Racial Justice (CRJ), becomes involved. Civil disobedience follows, and more than 500 people are arrested, including CRJ's executive director, Rev. Benjamin F.Chavis, Jr. CRJ, which was founded in 1963 in the midst of the civil rights movement, begins to turn its attention to environmental issues.

- **1983** – The General Accounting Office (GAO) launches an investigation of the socio-economic and racial composition of communities surrounding the four major hazardous waste landfills in the South. The GAO report reveals that three of the four landfills were located in predominantly black communities.

- **1985** – The Center for Environment, Commerce and Energy is founded as the first national African American environmental organization.

- The National Council of Churches' Eco-Justice Working Group begins focusing on environmental equity issues.

- **1987** – CRJ releases its landmark study, Toxic Wastes and Race in the United States – A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites. While presenting the report at the National Press Club in Washington, D.C., Rev. Chavis uses the term "environmental racism" for the first time. Among the major findings:
  - Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents.
  - Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, races still proved to be more significant.
  - Three out of every five black and Hispanic Americans live in communities with uncontrolled toxic waste sites.

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[134] This chronology was developed from numerous sources. Much of the information came from the consulting firm of Harris, DeVille & Associates, Inc. April 27, 1993. The decision to include events was my own, but the language used may not be. It is in no way a detailed account of all important events.

- **1990** – The Conference on Race and the Incidence of Environmental Hazards is held in January at the University of Michigan. This is the first time that an academic conference on race and the environment is held where a majority of the presenters (9 of 12) are people of color.

- In September, the organizers of this conference meet with EPA Administrator William K. Reilly and Council on Environmental Quality Chairman Michael R. Deland. The meeting is supposedly the first for an EPA Administrator with a predominantly minority group to discuss environmental equity issues.

- In response, Administrator Reilly organizes an EPA workgroup to study and report to him on the issues raised at the Michigan conference.

- **1991** – The First National People of Color Environmental Leadership Summit is held in October in Washington, D.C., attracting more than 600 participants and national media coverage. Rev. Chavis and former New Mexico Governor Toney Anaya serve as co-chairmen of the four-day summit. The major theme is that minorities are victims of "environmental racism," and among other things, they make it clear they want to become part of the "lily-white" mainstream environmental movement.

- **1992** – February 1992 is a watershed month for the environmental equity movement. EPA releases a draft report entitled "Environmental Equity: Reducing Risk for All Communities." The report, which was the work of EPA's Environmental Equity Workgroup that was organized by Administrator Reilly in 1990, concludes there is a general lack of data on environmental health effects by race and income. The report also details a list of eight recommendations to EPA, the first of which was for the agency to increase the priority it gives to issues of environmental equity. The release of the draft report attracts considerable national media coverage, and U.S. Rep. Henry Waxman of California chairs a subcommittee hearing on the relationship between race and environmental regulations. In general, environmentalists are critical of the report. The final version of the report is released in June.

- At about the same time that was going on in Washington, the Louisiana Advisory Committee of the U.S. Commission on Civil Rights conducts two days of fact-finding, environmental equity hearings in Baton Rouge. The primary focus of the hearings centers around claims that minority groups are being subjected to a disproportionate share of Louisiana's environmental problems.

- The March/April edition of the EPA Journal focuses exclusively on the environmental equity issue.

- In May, the Federal Environmental Justice Act of 1992 is introduced in Congress. The purpose of the act, sponsored by Sen. Al Gore and Rep. John Lewis of Georgia, is to assure that areas with the highest concentrations of toxic chemicals are scrutinized to ensure equal protection under the law and non-discriminatory compliance with all applicable environmental, health and safety standards.

- In September, the Louisiana Department of Environmental Quality funds a year-long, $40,000 study on environmental equity. Two professors at the LSU Dept. of Political Science are the principal investigators, and both have limited knowledge of industry.

- Also in September, EPA creates a headquarter-level Office of Equity.

- In December, the Birmingham, Alabama-based Southern Organizing Committee for Economic and Social Justice holds the Southern Community/Labor Conference for Environmental Justice in New Orleans. More than 2,500 civil rights, environmental and union activists attend, and participants network, share common experiences and try to find ways to become more effective in their fight against environmental racism.

- **1993** – EPA Region 6 forms an Environmental Equity Planning Committee in preparation for an environmental equity conference in July. Industry is grossly underrepresented.

- On March 18, EPA conducts a public hearing on the proposed HON rule in Baton Rouge. Among the claims made by those who testify: "Environmental racism is predominant in this area. Plants are on top of poor and minority communities, poisoning them, devaluing their land, etc."

- On March 27-28 in Birmingham, the Southern Organizing Committee for Social and Economic Justice holds a follow-up strategy session to December's Environmental Justice Conference. The stated purpose of the session is to outline strategies and develop an action plan.

- On March 29, the U.S. Commission on Civil Rights announces it is launching an investigation of EPA's enforcement activities in minority communities. In a March 8 letter to EPA Administrator Carol Browner, the commission's acting staff director says the probe is "a preliminary examination of environmental equity issues and civil rights enforcement activities at the EPA."

- During the first quarter of the year, inquiries from national media about equity issues become more frequent for Lousiana Chemical Association member companies.

- On April 9, Rev. Chavis is selected as the new executive director of the National Association for the Advancement of Colored People (NAACP). One of his goals is for the NAACP to become active in environmental issues.

- In May, the Louisiana Advisory Council of the U.S. Commission on Civil Rights is scheduled to release its written report on environmental equity issues in Louisiana.

- U.S. Rep. John Lewis of Georgia plans to reintroduce the Environmental Justice Act of 1992 once a new sponsor comes forward in the Senate.

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